TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 337.

JACOB D. COX, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, EX. REL. WILLIAM McGARRAHAN.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 16, 1869.

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1 UNITED STATES OF AMERICA, *ss:*

SEAL.] The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, between the United States, on the relation of William McGarrahan, and Orville H. Browning, Secretary of the Interior, and Jacob D. Cox, Secretary of the Interior, the successor in office of the said Orville H. Browning, a manifest error hath happened to the great damage of the said Jacob D. Cox, Secretary of the Interior, as by his complaint appears;

2 we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the thirtieth of November, in the year of our Lord one thousand eight hundred and sixty-nine.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

S. P. CHASE,
Chief Justice U. States.

(Indorsed:) Writ of error.

Filed Nov. 30, 1869.

3 The United States of America to William McGarrahan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Jacob D. Cox, Secretary of the Interior, is plaintiff in error, and the United States, on the relation of you, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

November 30th, 1869.

S. P. CHASE,
Chief Justice U. States.

4 On this 30th day of November, in the year of our Lord one thousand eight hundred and sixty-nine, personally appeared W. H. Rearden, before me, the subscriber, a notary public, and makes oath

that he delivered a true copy of the within citation to William McGarrahan this 30th day of November, 1869.

W. H. REARDEN.

Sworn to and subscribed the 30th day of November, A. D. 1869.

[SEAL.] EDM. F. BROWN,
Notary Public.

5 In the supreme court of the District of Columbia, the day of 18 .

vs. { At law.—No. / In error.

Know all men by these presents, that we, Jacob D. Cox, Secretary of the Interior, Wm. T. Otto, & Joseph S. Wilson, are bound unto the above-named the United States of America, for the use of William McGarrahan, in the sum of five hundred dollars, to be paid to the said United States for the use of the said William McGarrahan, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 30th day of November, 1869.

Whereas the above-named Jacob D. Cox, Secretary of the Interior, the successor in office of Orville H. Browning, Secretary of the Interior, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Jacob D. Cox, Secretary of the Interior, shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) J. D. COX. [SEAL.]
W. T. OTTO. [SEAL.]
JOS. S. WILSON. [SEAL.]

Sealed and delivered in presence of—
GEO. T. METCALF.
J. P. THOMPSON.

(Indorsed:) Copy of bond.

Filed Nov. 30, 1869.

6 In the supreme court of the District of Columbia, the third day of December, 1868.

To the honorable the justices of the supreme court of the District of Columbia:

Your relator, William McGarrahan, a citizen of the State of California, respectfully represents unto your honors—

That one Vincente P. Gomez claimed to be the owner, by virtue of a grant of land issued in the year 1844, by Manuel Micheltorena, then governor of Upper California, of a certain tract of land called Panoche Grande, of the extent of four square leagues or thereabouts, now lying

in the counties of Monterey and Fresno, in the State of California, bounded as follows: On the north by the lands of Don Julian Ursua, on the south by the Serrania, on the east by the Tulare Plains, or Valley of Tules, and on the west by the lands of Don Francisco Arias, which said tract is more particularly bounded and described in the survey made by the United States surveyor general for the State of California, approved September 11, 1862, as follows: Beginning at corner of sections 2, 11, 1, 12, T. 17 S., R. 11 E., Mount Diable
7 meridian; then according to true meridian, the variations of the magnetic needle 15 deg. 30 min. E.; thence—

Number.	Course.	Distance.		Number.	Course.	Distance.		Number.	Course.	Distance.	
		Chains.	*Links.*			*Chains.*	*Links.*			*Chains.*	*Links.*
1	North	40	00	15	South	20	00	29	North	40	00
2	West	80	00	16	East	60	00	30	East	20	00
3	North	40	00	17	South	200	00	31	North	80	00
4	West	80	00	18	East	82	15	32	East	40	00
5	North	40	00	19	South	280	00	33	North	60	00
6	West	100	00	20	West	20	00	34	East	20	00
7	South	100	00	21	South	60	00	35	North	20	00
8	East	20	00	22	East	20	00	36	East	20	00
9	South	60	00	23	South	20	00	37	North	80	40
10	East	80	00	24	East	60	00	38	West	40	00
11	South	40	00	25	North	60	00	39	North	280	00
12	East	120	00	26	East	20	00	40	West	40	00
13	South	60	00	27	North	20	00	41	North	40	00
14	East	20	00	28	East	20	00	42	West	40	00
								43	North	40	00
								44	West	200	38

8 Aggregate of exterior boundaries (2882 chains 93 links) 36 miles 2 chains and 93 links, and containing, according to the survey aforesaid, 17,768$\frac{77}{100}$ acres of land, and being designated on the plat of public surveys as—

Lot No. 37, T. 16 S., R. 11 E.
Lot No. 37, T. 17 S., R. 11 E.
Lot No. 37, T. 17 S., R. 12 E.
Lot No. 37, T. 18 S., R. 12 E.
} Mount Diable meridian.

Which said grant of land was confirmed to said Gomaz by the decree of the United States district court for the southern district of California, bearing date June 5, 1857, a copy of which decree, together with the decree amendatory thereof, is herewith filed, marked No.
Exhibit 1, page 14. 1, as well as a copy of the survey thereof by the surveyor
Exhibit 2, page 22. general of California, marked No. 2.

Your relator further represents that on the 22nd day of December, A. D. 1857, he purchased of said Vicente P. Gomez, for a valuable consideration, and in good faith, the said tract of land, as will more fully appear by reference to the deed thereof, a copy of which is herewith filed, and the original of which will be produced upon the
Exhibit 3, page 23. hearing—said copy marked No. 3.

Your relator further represents unto your honors that in the
9 month of August A. D. 1862, the said decree so rendered as aforesaid was appealed by the United States to the Supreme Court of the United States, wherein such proceedings were had that, in April A. D. 1866, the said decree in favor of said Gomez was reversed and the petition therein ordered to be dismissed.

Your relator further states that soon after his said purchase of said land from said Gomez, he went upon the land so purchased, and in or about the month of February, A. D. 1858, took formal possession of the same and exercised acts of ownership thereover, notified parties that he had purchased and was the owner thereof, and employed a number of persons as laborers thereon, among whom were Ambrosia Gomez, Hanlycone, Shaw, Griswold, O'Brien, Brown, Oliver, and Michael Cody; and in addition to the persons so named were sundry persons then temporarily residing on said lands, who had made improvements thereon of considerable value, which interests and improvements your relator purchased from such parties at an expenditure of about fifteen thou-
10 sand (sic) dollars, as will more fully appear by reference to the deeds for the same, copies of which are herewith filed,
Exhibit 4, p. 30. marked respectively No. 4. (These not on file. R. J. M.)

Your relator further represents that the said parties last named, or those under whom they held, had settled upon and improved said land in or about the month of November, 1851; and that your relator has continued in uninterrupted possession, occupancy, and enjoyment of the said land from the date of his purchase as aforesaid, and has expended thereon, in addition to the said purchase-money, the sum of thirty-seven thousand dollars in gold coin, and that he still continues in such possession of said lands.

Your relator further states that the said survey, so made as aforesaid, by the United States surveyor general for California, was approved by Hon. Caleb B. Smith, then Secretary of the Interior, also subsequently by J. P. Usher, the successor of said Smith, and also by President Lincoln, who directed a patent to issue to your relator as the legal representative of Vincente P. Gomaz, but that, although a patent was made out in conformity with such direction, yet that the
11 same was not delivered.

Your relator further represents that, in the purchase of said land, he relied upon the confirmation of the title thereto by the district court of the United States as aforesaid; and upon the advice of counsel, that the said decree of confirmation was in accordance with the decision of the Supreme Court of the United States before then rendered upon the questions involved in said decree; and that in like good faith, he expended the other large sums of money in the purchase of the improvements of the occupants thereof, and in the other improvements before mentioned made by him.

Your relator further represents that, as he is advised and believes, no valid adverse title exists unless it be in the United States, as evidence of which fact your relator hereby refers to a letter from the Commissioner of the General Land Office to the Chairman of the Judiciary Committee of the House of Representatives, of date January 15, 1867, in which he states that "there are found on our files no in-
Exhibit 8, p. 36. dividual adverse interests reported." A copy of which letter is herewith filed, marked No. 8.

12 That on or about the month of October, A. D. 1868, your relator made application to the Hon. O. H. Browning, Secretary of the Interior, for permission to purchase said tract of land, under the provisions of the act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in California." A copy of which ap-
Exhibit 9, p. 39. plication is herewith filed, marked No. 9.

Your relator, in accordance with the seventh section of said act, made proofs of the facts hereinbefore stated, before said Secretary, which application was refused by the said Secretary, for reasons set forth in a

communication bearing date Nov'r 28, 1868. A copy of
Exhibit 10, p. 44. which is herewith filed, marked No. 10, and made part hereof.

Your relator further represents that, on the 3d day of December, 1868, he renewed his application to the said Secretary of the Interior to purchase said land, and tendered to said Secretary the sum of twenty-two thousand two hundred and ten dollars $\frac{96}{100}$, as purchase-money therefor, which said tender was refused by the Secretary.

Your relator further states that the facts stated in said appli-
13 cation were proven to said Secretary, and that the said Secretary found, from the proofs, the facts to be, that your relator, in good faith and for a valuable consideration, purchased the said land of said Gomez, the Mexican grantor, which grant was subsequently rejected.

That your relator had used, improved, and continued in the actual possession of the same.

That no valid adverse title exists, except of the United States, but that the rejection, by said Secretary, was for causes other and different, and relator is informed and believes for the reason set forth in said opinion of said Secretary.

Your relator further states that he is ready and willing, and hereby offers to pay, to the proper officers of the government for the purchase of said land, said money so tendered, or such sum as the court shall decree.

Wherefore, inasmuch as relator is legally entitled to said patent, your relator prays that a writ of mandamus may issue from this honorable court, directing the said Hon'ble O. H. Browning, Secretary of the Interior, to issue or cause to be issued a patent for the land so herein described to your relator, and for such other or further relief which to your honors may seem meet and proper. And, as in duty bound, your relator will ever pray.

WM. McGARRAHAN.

A. L. MERRIMAN, *Attorney.*

14 DISTRICT OF COLUMBIA, *County of Washington, ss:*

William McGarrahan, being first duly sworn, deposes and says that the foregoing petition by him signed is true, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

WM. McGARRAHAN.

Subscribed & sworn to before me this 3d day of December, 1868.

R. J. MEIGS, *Clerk.*

Subscribed and sworn to as amended this 7th day of December, 1868.

WM. McGARRAHAN.

R. J. MEIGS, *Clerk.*

Marshal's endorsement.

Served copy of the within petition on the def't this 8th of December, 1868.

D. S. GOODING, *Marshal D. C.*

Your relator further states that soon after his said purchase of said land from said Gomez, he went upon the land so purchased, and in or about the month of February, A. D. 1858, took formal possession of the same and exercised acts of ownership thereover, notified parties that he had purchased and was the owner thereof, and employed a number of persons as laborers thereon, among whom were Ambrosia Gomez, Hanlycone, Shaw, Griswold, O'Brien, Brown, Oliver, and Michael Cody; and in addition to the persons so named were sundry persons then temporarily residing on said lands, who had made improvements thereon of considerable value, which interests and improvements your relator purchased from such parties at an expenditure of about fifteen thou-
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WM. McGARRAHAN.

A. L. MERRIMAN, *Attorney.*

14 DISTRICT OF COLUMBIA, *County of Washington, ss:*

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WM. McGARRAHAN.

Subscribed & sworn to before me this 3d day of December, 1868.

R. J. MEIGS, *Clerk.*

Subscribed and sworn to as amended this 7th day of December, 1868.

WM. McGARRAHAN.

R. J. MEIGS, *Clerk.*

Marshal's endorsement.

Served copy of the within petition on the def't this 8th of December, 1868.

D. S. GOODING, *Marshal D. C.*

Exhibit No. 1 to petition.

Supreme Court of the United States.—No. 299, December term, 1858.

THE UNITED STATES, APP'TS, *vs.* VICENTE P. GOMEZ. } Appeal from the district court of the United States for the southern district of California.

Extract from the minutes of the court, June 5th, 1857.

Now, on this day, this case coming on to be heard, the parties appearing by their respective attorneys, the appellant by Sloan and Hartman, esqr's, and the appellees by P. Ord, U. S. dist. att'y, and, after argument of counsel aforesaid, the same is submitted to the court for final adjudication.

Whereupon the court, being fully advised in the premises, delivered its opinion confirming the claim of the appellant to the extent called for in the transcript and papers—three leagues or sitios de ganada mayor—and a decree was ordered to be entered [to be entered] up in conformity to said opinion.

Decree.

In the district court of the United States, southern district of California

VICENTE P. GOMEZ, APPELLANT, *ads.* THE UNITED STATES, APPELLEES. } Case No. 393, "Panoche Grande." Trans. No. 569.

This cause coming on to be heard on appeal from the decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under the act of Congress approved March 3d, 1851, on a transcript of the decision and proceedings of said board, and the papers and evidence upon which said decision was founded, and the other evidence adduced by the appellant before this court, and it appearing to the court that said transcript and the notice of appeal have been duly filed according to law, and counsel for the respective parties having been heard, it is ordered, adjudged, and decreed that the decision of said board of land commissioners be, and the same is hereby, reversed, and that the claim of appellant is good and valid, and the same is hereby confirmed to him as follows, to wit, three leagues of land, more or less, situate in the county of Monterey, State of California, bounded on the north by the lands of Julian Ursua, on the south by the hills, on the east by the Valley of the Tulares, and on the west by the lands of Francisco Arias, as is more fully set forth and described in the title issues for the same, and the diseño accompanying the same.

And it appearing to the court that, on the 5th day of June, A. D. 1857, the lands in this case described had been confirmed by the court to said claimant and appellant, and it having been omitted to sign and enter a decree therefor, at this date aforesaid, it is ordered that the same be done now for them.

ISAAC S. K. OGIER,
U. S. Dist. Judge.

Filed this 7th day of January, A. D. 1858, nunc pro tunc (5th June, A. D. 1857).

C. SIMS, *Clk*,
Per J. H. COLEMAN, *D'p'ty.*

Recorded on page 248.

Extract from minutes of court, Thursday, February 4th, 1858.

"On motion of Sloan and Hartman, it is ordered that the appellant have leave to amend the decree filed in this case, by substituting another in its stead."

Amended decree.

In the district court of the United States for the southern district of California.

VICENTE P. GOMEZ, APPELLANT, *ads.* THE UNITED STATES, APPELLEES. } Case No. 393, "Panoche Grande." Transcript No. 569.

This cause came on to be heard on appeal from the decision of the United States land commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved March 3d, 1851, on a transcript of the decision and proceedings of
18 said board, and the papers and evidence upon which said decision was founded, and the other evidence adduced by the appellant before this court, and it appearing to this court that said transcript and notice of intention to appeal have been duly filed according to law, and counsel for the respective parties having been heard, it is ordered, adjudged, and decreed that the decision of the said board of land commissioners be, and the same is hereby, reversed, and that the claim of the said appellant is good and valid, and the same is hereby confirmed to him as follows, to wit: The tract of land situate in the county of Fresno, State of California, known by the name of "Panoche Grande," bounded northerly by the lands of Don Julian Ursua, southerly by the hills, easterly by the Valley of the Tulares, and westerly by the lands of Don Francisco Arias, containing four square leagues of land and no more: Provided, that quantity is contained within the boundaries aforesaid; and provided, also, that if a less quantity is contained within the boundaries aforesaid, that confirmation of such less quantity is hereby made to said claimant, and for a more particular description of which said lands reference is hereby made to the map contained in
19 the transcript in this case.

And it also appearing to this court that, heretofore, to wit, on the 5th day of June, A. D. 1857, at a regular term of this court, holden in the town of Monterey, State of California, the claim of the appellant in this case had been confirmed by this court, but that it had been omitted by the court to sign the decree of confirmation at the time the same was made:

It is further ordered by this court that the same be signed now as for then.

Given under my hand in open court this 5th day of February, A. D. 1858.

ISAAC S. K. OGIER,
U. S. Dist. Judge for the S. Dist. of Cal.

Filed this 5th February, 1858, for the 5th June, 1857.
C. SIMS, *Clk*,
P'r JO. H. COLEMAN, *D'p'ty.*

Recorded on page 271.

Extracts from the minutes of the same court.

MARCH 15*th*, 1858.

On motion of E. J. C. Kewen, acting U. S. dist. att'y, for leave to take appeal in the following cause, to wit:

20 No. 393. The same is taken under advisement.

In the district court of the United States for the southern district of California.—Los Angeles.—December term, 1857.

On motion of P. Ord, attorney of the United States for the southern district of California, it is ordered by the court that appeal to the Supreme Court of the United States be allowed the United States in the following cause, viz.: No. 393, Vicente Gomez vs. United States, decided June 5, 1857.

Filed 15th March, 1858.

C. SIMS, *Clk*,
P'r J. H. JOHNSON, *D'p'ty.*

UNITED STATES OF AMERICA,
State of California, Southern District of California:

I, C. Sims, clerk of the district court of the United States for the southern district of California, do hereby certify the foregoing 27 pages, marked from 1 to 27, both inclusive, to contain a true, full, and correct copy of the record of the procedings and decision of said court, and the papers and evidence upon which said decision was founded,
21 on file in my office, in case No. 393, on the docket of said court, wherein Vicente P. Gomez is the appellant, and the United States are the appellees, for the place called "Panoche Grande."

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Los Angeles, California, this seventh day of September, A. D. 1858.

[SEAL.]

C. SIMS, *Clerk*,
P'r W. W. STETSON, *D'p'ty.*

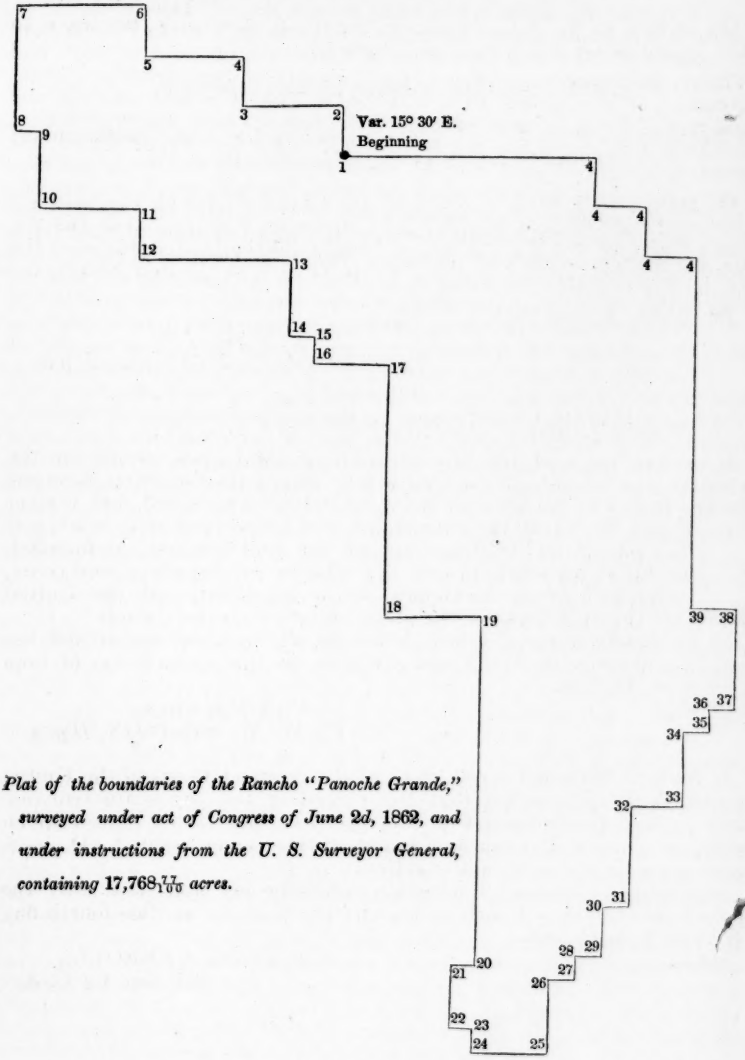
I, William Thomas Carroll, clerk of the Supreme Court of the United States, do hereby certify that the preceding ten pages are truly extracted from the transcript of the record of the United States, appellants, vs. Vicente P. Gomez, No. 299, of December term, A. D. 1858, now on the files of said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this fourth day of August, A. D. 1859.

[SEAL.]

WM. THOS. CARROLL,
Clk Sup. C't U. S.

22 *Exhibit No.* 2. (See page .)



Plat of the boundaries of the Rancho "Panoche Grande," surveyed under act of Congress of June 2d, 1862, and under instructions from the U. S. Surveyor General, containing 17,768$\frac{77}{100}$ *acres.*

Aggregate of exterior boundaries, 2,882 chains, 93 links—36 miles, 2 chains, 93 links.

23 *Exhibit No. 3.—Deed.* (See page .)

This indenture, made this twenty-second day of December, A. D. eighteen hundred and fifty-seven, by and between Vicente P. Gomez, of the county of Monterey and State of California, of the first part, and William McGarrahan, of the city and county of San Francisco, State aforesaid, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of eleven hundred dollars to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and does by these presents grant, bargain, sell, alien, remise, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain rancho or tract of land lying and being in the county of Fresno and State of California, and known as the Panoche Grande Rancho; bounded on the north by the lands of Don Julian Ursua, on the south by the Serrania, on the east by the Tulare Plains, or Valley of Tules, on the west by the lands of
24 Don Frisco Arias, containing three square leagues of land, more or less, and being the same lands for which a decree of confirmation has been entered in favor of the said party of the first part, in the district court of the United States for the southern district of California, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, and interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs, and assigns, forever, subject, however, to an agreement heretofore made by the party of the first part, to and with Pacificus Ord, an undivided interest in said rancho, or tract of
25 land, not exceeding the one undivided half thereof. And the said party of the first part, for himself, his heirs, executors, and administrators, does hereby covenant to and with the said party of the second part that he has full, perfect, and absolute right, power, and authority to convey the premises above described, and every part and parcel thereof, subject only to the agreement of Pacificus Ord before mentioned; that the said Pacificus Ord is not entitled to have of said rancho, or tract of land, under or by virtue of any deed or agreement, made or executed by the said party of the first part to or with said Ord; and that he will well and truly warrant and forever defend the title to the said tract of land; and that he, his heirs, executors, and administrators will well and truly warrant and forever defend the said premises in the quiet and peaceful enjoyment and possession of the said party of the second part, his heirs, and assigns, against the said party of the first part, his heirs, executors, and administrators, and against all and every person and persons whomsoever lawfully claiming
26 or to claim the same, or any part or portion thereof.

In testimony whereof, the said party of the first part has hereunto subscribed his name and affixed his seal, on the day and year first above written.

[SEAL.] VICENTE PERF'TO GOMEZ.

Witness: R. R. PROVINES.

Received for record May 9, 1859, at 10 o'clock a. m., and recorded in Book D of Conveyances, on page ——, and following.

JAMES H. GLEASON,
County Recorder, Monterey County,
By EDW. L. WILLIAMS, *Deputy.*

STATE OF CALIFORNIA, *City & County of San Francisco, ss:*

Be it remembered that on this twenty-third day of December, A. D. eighteen hundred and fifty-seven, personally appeared before me, the undersigned William Duer, who then was and still am the county clerk, within and for the said city and county of San Francisco, State aforesaid, Vicente Perfecto Gomez, who was satisfactorily proved to
27 me to be the person described in and who executed the foregoing conveyance, by the oath of Charles Gailhard, a competent and credible witness, for that purpose by me duly sworn, and he, the said Vicente Perfecto Gomez, acknowledged that he executed the said conveyance freely and voluntarily, for the uses and purposes therein mentioned.

In testimony whereof, I hereunto subscribe my name, and affix my official seal at office, in the city and county of San Francisco, on the day and year hereinbefore mentioned.

[SEAL.] WILLIAM DUER, *County Clerk.*

STATE OF CALIFORNIA, *City & County of San Francisco, ss:*

Be it remembered that on the twenty-third day of December, A. D. eighteen hundred and fifty-seven, personally appeared before me, the undersigned William Duer, who then was and still am the county clerk, within and for the said city and county of San Francisco, State
28 aforesaid, Vicente Perfecto Gomez, who was satisfactorily proved to me to be the person described in and who executed the within and foregoing conveyance, by the oath of Charles Gailhard, a competent and credible witness, for that purpose, who was by me first duly sworn, and he the said Vicente Perfecto Gomez then and there acknowledged to me that he executed the said conveyance freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof, I hereunto subscribe my name and affix my official seal at office, in the said city and county of San Francisco, on this 23rd day of January, A. D. eighteen hundred and fifty-eight.

[SEAL.] WILLIAM DUER, *County Clerk.*

Filed for record, Thursday, the 31st day of December, A. D. 1857, at 8 o'clock and 10 minutes p. m., and recorded at the request of L. G. Hughes, esq., agent for Heston's Express, in Book A of Deeds, folios 95, 96, and 97.

JAMES SAYLES, JR.,
Recorder Fresno County.

29 Filed for record, Thursday, January 28th, 1858, at 6 o'clock p. m., and five minutes, and recorded at the request of L. G. Hughes, esq., agent of Heston's Express, in Book A of Deeds, folios 109, 110, and 111.

JAMES SAYLES, JR.,
Recorder Fresno County.

Filed Wednesday, 23rd day of March, A. D. 1859, at 7 o'clock p. m. Recorded at request of Wm. McGarrahan, Book A of Deeds, on folios 245, 246, 247, 248, 249, and 250.

E. G. RECTOR,
Recorder Monterey County.

EXHIBIT 4.—*Deed. (Exhibit 4.)—E. C. Tully and others, to Wm. McGarrahan, dated Oct. 22, 1863.*

This indenture, made the twenty-second day of October, in the year of our Lord one thousand eight hundred and sixty-three, between E. C. Tully, Eli Burdell, Thomas Edwards, and James Branham, parties of the first part, and William McGarrahan, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of fifteen thousand dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, conveyed, and quit-claimed, and by these presents doth grant, bargain, sell, remise, convey, and quit-claim, unto the said party of the second part, and to his heirs and assigns for ever, all the right, title, and interest of the said parties of the first part, in and to all that certain tract or parcel of land situate partly in the county of Fresno and partly in the county of Monterey, State of California, and known by the name of "Panoche Grande," and bounded and described as follows, to wit: Bounded northerly by the land now or formerly claimed by Don Julian Ursua, southerly by the hills, easterly by the Valley of the Tulare, and westerly by the lands now or formerly claimed by Don Francisco Arias, containing four square leagues of land, and also all mines, leods, lodes, or claims, or mining rights of gold, silver, quicksilver, or other precious metals or minerals, and also the mines known as the Picacha mines, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof, to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs, and assigns, forever, and said parties of the first part for themselves, and each of them, thier and each of thier heirs, executors, and administratrors, do covenant and agree to and with the party of the second part, his heirs, and assigns, that they have not, either individually or collectively, or otherwise, made, done, or committed any act or acts, thing or things, whereby or by means whereof the said premises now are or at any time hereafter may or can be in any wise changed, impeached, or encumbered. In witness whereof, the said parties of the first part have hereunto set thier hands and seals the day and year first above written.

E. C. TULLY, [SEAL.]
By his att'y in fact, THOS. BORELAY.
ELI RUNDELL, [SEAL.]
By his att'y in fact, THOS. BORELAY.
THOS. EDWARDS, [SEAL.]
By his att'y in fact, THOS. BORELAY. [SEAL.]
JAMES BRANHAM,
By his att'y in fact, ISAAC BRANHAM. [SEAL.]

Witness: R. H. LLOYD.

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

On this 23d day of October, A. D. one thousand eight hundred and sixty-three, before me, Henry Haight, a notary public in and for said city and county, duly commissioned and sworn, personally appeared Isaac Branham, personally known to me to be the person described in and who executed by power of attorney from James Branhman, the annexed instrument as the attorney in fact of James Branham, named in

the annexed instrument as a party thereto and therein described as the party executing the same by his said attorney; and the said Isaac Branham acknowledged to me that he executed the same freely and
34 voluntarily, as and for the act and deed of the said James Branham, an for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] HENRY HAIGHT, *Notary Public.*

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

On this 23d day of October, A. D. one thousand eight hundred and sixty-three, before me, Henry Haight, a notary public, in and for said city and county duly commissioned and sworn, personally appeared Thomas Bodley, personally known to me to be the person described in and who executed by power of attorney from E. C. Tully, Eli Rundell, and Thos. Edwards, the annexed instrument as the attorney in fact of said parties above named in the annexed instrument as parties
35 thereto and therein described as the parties executing the same by their said attorney, and the said Thos. Bodley acknowledged to me that he executed the same freely and voluntarily as and for the act and deed of the said E. C. Tully, Eli Rundell, and T. Edwards, and for the uses and purposes therein mentioned. In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] HENRY HAIGHT, *Notary Public.*

Endorsement on deed.

Recorded at request of Wm. McGarrahan, October 27, A. D. 1863, at min. past 7 p. m., in Book E of Conveyance, pages 466 & following.

G. M. BIRD, *Recorder, Monterey Co.,*
Per W. M. R. PARKER, *Deputy.*

36 EXHIBIT 8.—*Letter of Jos. S. Wilson, Commissioner Land Office, to Hon. James F. Wilson, Chairman Judiciary Committee H. R.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
January 15, 1867.

SIR: Referring to your communication of the 10th instant, acknowledged on the 11th instant, I have the honor to lay before you the following in relation to the "Panoche Grande," the subject of your call:

1. The tract claimed, containing 17,768.77 acres, is situated in townships 16 and 17 south, range 11 east, and townships 17 and 18 south, range 12 east, Mount Diablo meridian, California, as shown on the diagram herewith.

2. Vicente P. Gomez was the original claimant. His claim to confirmation of title was rejected March 6, 1855, by the board of land commissioners, under the act of March 3, 1851, Statutes, vol. 9, p. 631.

3. That decree of the board was reversed by the United States district court for the southern district of California, February 8,
37 1858, as of June 5, 1857.

4. The case came before the United States Supreme Court three several times, the action of said court being found in 23 Howard, p. 326, 1 Wallace, p. 690, and 3 Wallace, p. 752, by reference to which it will be seen that the claim was finally rejected.

Before the last action of the Supreme Court the case came before this office on a return of survey by the United States surveyor general and application for patent to issue on said return of survey.

This application was rejected by this office for reasons presented in the enclosed copy No. 1, of report dated October 29, 1862, to Secretary Caleb B. Smith. Secretary Smith, however, overruled the decision of this office, and on the 29th of December, 1862, ordered the issue of patent, copy No. 2, herewith.

This decision was, at the instance of this office, drawn in review by Mr. Smith's successor, the Hon. John P. Usher, copy No. 3, who on the 4th of March 1863, affirmed Mr. Smith's decision, copy No. 4, but before the consumation of the matter in the issuing of patent, the proceed-
38 ings in that respect were suspended at the instance of the Attorney General, copy No. 5, and now the claim stands with the petition for confirmation dismissed.

The matter is now before the Committee on the Judiciary on the application of the parties to enter the lands, and upon this point the honorable chairman has called for information.

In reply, I respectfully refer to the legislative percedents giving authority in similar cases: in "Sascol," act of 3d March, 1863, Statutes, vol. 12, p. 808; "Bolsa de Tomalis," act of 17th June, 1864, Statutes, vol. 13, p. 136; "Ex-mission San Jose," act of 3d March, 1865, Statutes, vol. 13, p. 534; and "Laguna de Santos Calle," act of 2d July, 1864, Statutes, vol. 13, p. 372.

These precedents apply to Panoche Grande in so far as the agricultural portion thereof is concerned, but the Panoche Grande embraces, it is understood, valuable quicksilver mines; in so far as these interests are concerned, it is suggested that the principles of the act of 26 July, 1866, Statutes for 1866, p. 251, entitled "An act granting the right
39 of way to ditch and canal owners over the public lands, and for other purposes," might be made applicable.

It may be added that there are found on our files no individual adverse interests reported.

I am, sir, very respectfully, your obedient servant,

JOS. S. WILSON, *Commissioner.*

Hon. JAMES F. WILSON.
Chairman Judiciary Committee, House of Representatives.

EXHIBIT No. 9.—*Application of McGarrahan to purchase the Panoch Grande Ranche, California.*

WASHINGTON, *Oct. 5th*, 1868.

Hon. O. H. BROWNING, *Secretary of the Interior:*

SIR: The undersigned respectfully represents that on the 22nd day of December, 1857, he purchased of one Vicente P. Gomez certain tract
40 of land know as the Panoche Grande Ranche, situate in the counties of Monterey and Fresno, State of California; which said tract of land had been granted to the said Gomez by the government of Mexico. The undersigned further represents that he purchased the said tract of land in good faith and for a valuable consideration after a decree of confirmation by the United States district court for the southern district of California, and that he is now sole owner thereof. In proof of these allegations, the department is respectfully referred to a printed copy of deed marked A and hereto attached, and Exhibits B, C, D, E, F, G.

The undersigned further represents that subseqently, to wit, at the December term of 1865 (April, 1866), the said grant was rejected by the

Supreme Court of the United States, as shown by the opinions of said court, 3rd Wallace, 752.

It is further represented by the undersigned that after his said purchase from the said Vicente P. Gomez, he went upon the land, to wit, about the month of February, 1858, and took formal possession
41 of the same and exercised acts of ownership in notifying parties that he had purchased, and was the owner of the said land. And further, that the undersigned employed on the said land a number of persons, among whom may be mentioned Ambrosia Gomez, Hardgrove, Sloan, Grinwold, O'Brien, Brown, Olivia, and Michael Cody; and besides these said parties, there were also sundry persons temporarily on said lands, who had made improvements to the value of between six and seven thousand dollars in gold coin, all of which the undersigned purchased at an expenditure of $15,300 in gold. See deeds annexed, marked H, I, J, K.

The undersigned would further represent that the said parties, or those under whom they held, had settled upon, improved, and occupied the said land in or about November, A. D. 1851 (see abstract from records of Monterey County hereto attached and marked L), and that the undersigned has continued in uninterrupted possession, occu-
42 pancy, and enjoyment of the said land since the date of his said purchase, and has expended thereon, or caused to be expended, in addition to the purchased money already mentioned, the sum of about $37,000 in gold coin, and that he still continues in possession of said lands, and is making still further improvements. (See affidavit of James Sturgis hereto attached and marked "M.")

The undersigned further represents that the said land has been regularly surveyed under the laws of the United States by the U. S. surveyor general for the State of California, and approved by him, and also approved by the Hon. Caleb B. Smith, then Secretary of the Interior, and subsequently by the Hon. J. P. Usher, also Secretary of the Interior, which survey and official approval was subsequently confirmed by President Lincoln, who ordered the patent to issue therefor. (See survey on file in General Land Office, and printed decisions of Secretaries Smith and Usher, and letter of Gen'l D. E. Sickles, attached hereto and marked "N.")

43 The undersigned would further represent that he is advised, and believes, that no valid adverse title exists, unless it be in the United States, and begs to refer to the letter of the honorabl Commissioner of the General Land Office, addressed to the Hon. Jas. F. Wilson, chairman of the Judiciary Committee of the House of Representatives, under date of January 15th, 1867, in which the department says: It may be added that there are found on our files no individual adverse interests reported. (See Exhibit O.)

Under the state of facts hereinbefore recited the undersigned prays that he may be allowed to purchase the said tract of land according to the rights secured to him by the 7th section of the act of Congress, entitled "An act to quiet land titles in California," approved July 23rd, 1866, 14 vol. U. S. Statutes at Large, p. 219, and that a patent may be issued to him for the same on his paying therefor the minimum price established by law.

And, as in duty bound, the undersigned will ever pray, &c.

WM. McGARRAHAN.

44 EXHIBIT 10.—*Letter from O. H. Browning, Secretary of the Interior, to Messrs. T. & C. Ewing & H. Beard, Washington, D. C.*

DEPARTMENT OF THE INTERIOR,
Washington, D. C., 28th Nov., 1868.

GENTLEMEN: I have considered your letters of the 20th and 27th ultimos, in behalf of the application of William McGarrahan to make an entry under section 7th of the act approved 23rd July, 1866 (14 Stat., 230), of this land embraced within the lines of the survey of the "Panoche Grande" private land claim, California.

On the 12th August last, I received from the Commissioner of the General Land Office a communication in regard to the land in question, in which he expressed the opinion that it should be dealt with under the acts of Congress in regard to the disposal of public lands. On the the 14th of the same month I replied as follows:

45 DEPARTMENT OF THE INTERIOR,
Washington, D. C., 14th Aug., 1868.

SIR: I have received your letter of the 13th instant concerning your proposed action in relation to the California private land claims, known as "Panoche Grande." It appears that on the 25th March, 1867, the House of Representatives passed a joint resolution directing the Secretary of the Interior to withhold the issuing of any patent, and to permit no proceedings in the department affecting the title to the tract of land above named, untill the claim thereto, then pending in Congress should have been disposed.

In deference to this resolution instructions were issued in April, 1867, by the Commissioner of the General Land Office to the local land officers to suspend action on all claims falling within the boundaries of the claim above mentioned; which instructions were subsequently repeated and the suspension of action still continued.

46 At the last session of Congress, the House of Representatives, after an elaborate examination and discussion of the claim, fully affirmed it to William McGarrahan, upon condition that he should, within twelve months after the passage of the act, pay into the treasury of the United States the sum of one dollar and twenty-five cents per acre for the land embraced within the survey. The bill thus passed by the House was sent to the Senate for its concurrence, but final action has not yet been had upon it by that body.

The passage of the above-mentioned bill by the House of Representatives, after a full and careful consideration of all the facts and circumstances attending Mr. McGarrahan's claim, clearly indicates their opinion of the equities of the case.

Under all the circumstances, it would, in my judgment, be highly improper that further proceedings should be had in this department affecting the title to the land in controversy, until the claim

47 thereto now pending in Congress shall have been disposed of.

You will, therefore, repeat your instructions to the local officers to suspend action on all claims falling within the survey until further orders.

The papers accompanying your letter are herewith returned.

I am, sir, very respectfully, your ob't servant,

O. H. BROWNING, *Secretary.*

Hon. JOS. S. WILSON, *Com'r Gen. Land Office.*

I adhere to the opinion then expressed, that it would be highly improper that further proceedings should be had in this department affect-

ing the title to the land in controversy, until the claim thereto now pending in Congress shall have been disposed of.

I, therefore, respectfully decline to express any opinion upon the legal questions which you have submitted.

I am, gentlemen, very respectfully, your ob't servant,

O. H. BROWNING, *Secretary.*

Messrs. T. & C. EWING & H. BEARD, *Washington, D. C.*

48 Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court for said district, commencing the first Tuesday, 3d day, of November, 1868.

TUESDAY, *November* 3, 1868.

By order of Chief Justice Cartter, presiding, the court is opened by proclamation of the marshal.

TUESDAY, *December* 8, 1868.

Session resumed pursuant to adjournment. Chief Justice Cartter, presiding.

Order to issue rule to show cause.

THE UNITED STATES, ON THE RELATION OF William McGarrahan, *vs.* ORVILLE H. BROWNING, SECRETARY OF THE Interior, respondent. } At law.—No. 5348.

49 Upon reading and filing the relator's petition, it is ordered, for the causes therein stated, that Orville H. Browning, Secretary of the Interior, show cause on the 3d Monday of January, 1869, before this court, sitting in general term, why the writ of mandamus prayed for in said petition should not be issued; provided a copy of this order, and a copy of the petition be served upon said Secretary at least thirty days before said 3d Monday of January, 1869.

By Olin, justice.

Rule to show cause.

In the supreme court of the District of Columbia, 7th December, 1868.

U. S., EX REL. WILLIAM MCGARRAHAN, *vs.* ORVILLE H. BROWNING, SEC'Y OF THE INTERIOR. } No. 5348.—At law.

The President of the United States to the defendant, greeting:

50 For causes and reasons set forth and shown in the petition filed in this cause, you are hereby commanded to show cause on the 3d Monday of January, 1869, before this court sitting in general term, why the writ of mandamus prayed for in said petition should not issue, &c., &c.

Hereof fail not, under pain of attachment and such other process of contempt as may be issued by the court against you.

D. K. CARTTER, *Chief Justice, &c.*
R. J. MEIGS, *Clerk.*

Witness: MERRIMAN.

Marshal's return.

Service by leaving a copy of the within writ with the def't.
Dec'r 7th, 1868. D. S. GOODING, *Marshal.*

Defendant's answer.—Filed Jan. 26, 1869.

In the supreme court of the District of Columbia.

THE UNITED STATES, EX REL. WM. MCGARRAHAN, *vs.* ORVILLE H. BROWNING. } At law.—No. 5348.

51 To the honorable the judges of the supreme court of the District of Columbia:

The undersigned, Orville H. Browning, Secretary of the Department of the Interior of the United States, respectfully states—

That he has been served with notice of an order or rule from this honorable court to show cause why a writ of mandamus should not be issued from the said court, directed to him as the Secretary of the Department of Interior, one of the executive departments of the United States, upon the petition of William McGarrahan, commanding him to issue or cause to be issued a patent for certain lands claimed by the said petitioner, and fully described in the aforesaid petition.

And the undersigned submits to your honors that from said petition and accompanying exhibits, setting forth the official action of the
52 undersigned, and the reasons moving him thereto, it appears that your honors have not jurisdiction in the matter of said petition and cannot grant the writ prayed for by said petitioner—

1st. Because the subject-matter of the petition is purely of executive cognizance, resting in the judgment and discretion of executive officers in the ordinary discharge of their official duties.

2. Because the subject-matter is one in which judgment and discretion are to be exercised.

3. Because the issuance of patents for lands is by statute the duty of the President of the United States.

O. H. BROWNING,
Secretary of the Interior.

53 Proceedings before the supreme court of the District of Columbia, in general term, commencing the third Monday, 18th day, of January, 1869.

MONDAY, *January* 18, 1869.

Session commenced by proclamation of the marshal, upon order of the chief justice. Present, Chief Justice Cartter and Justices Olin, Fisher, and Wylie.

FRIDAY, *February* 5, 1869.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin and Wylie; absent, Justice Fisher, holding the criminal court.

Stipulations for hearing cause in general term.—Filed February 5, 1869.

In the supreme court of the District of Columbia, in banc, Jan'y term, 1869.

54 THE UNITED STATES, ON RELATION OF William McGarrahan,
vs.
O. H. BROWNING, SECRETARY OF THE INTERIOR.

It is stipulated in the above cause that the same be submitted to the court upon briefs and arguments, and that the said court may render its judgment in vacation, as of the present term, and as of the day of such submission.

Feb'y 5, 1869.

A. L. MERRIMAN, *for Relator.*
NATH'L WILSON, *Ass't U. S. Att'y.*

Adjourned till 10 o'clock to-morrow morning.

SATURDAY, *February* 6, 1869.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin & Wylie. Absent, Justice Fisher, holding the criminal court.

McGARRAHAN, RELATOR,
vs.
O. H. BROWNING, SECRETARY OF THE INTERIOR, respondent. } At law.—No. 5348.

Argued by Mr. Merriman for relator, and Mr. N. Wilson for respondent.

55 *Order, general term, to issue writ of mandamus.—Filed July* 8, 1869.

In the supreme court of the District of Columbia, sitting in general term, this 6th day of February, A. D. 1869.

THE UNITED STATES, UPON RELATION OF William McGarrahan,
vs.
ORVILLE H. BROWNING, SECRETARY of the Interior.

And now on this day this cause came on to be heard upon the petition and answer filed in said cause, and the counsel therein respectively having submitted said cause for hearing upon the said petition, answer, and their respective briefs and arguments, in accordance with their stipulation filed on the 5th inst., and the court being fully advised in the premises, do hereby order. judge, and decree that the prayer of the said relator be granted, and that a writ of mandamus issue from this
56 court, under the seal thereof, and attested by the clerk of the same, directed to the said Orville H. Browning, Secretary of the Interior, or to his successor in office, directing and commanding him, the said Secretary of the Interior, to issue, or cause to be issued, to the said

Marshal's return.

Service by leaving a copy of the within writ with the def't.
Dec'r 7th, 1868. D. S. GOODING, *Marshal.*

Defendant's answer.—Filed Jan. 26, 1869.

In the supreme court of the District of Columbia.

THE UNITED STATES, EX REL. WM. MCGARRAHAN, *vs.* ORVILLE H. BROWNING. } At law.—No. 5348.

51 To the honorable the judges of the supreme court of the District of Columbia:

The undersigned, Orville H. Browning, Secretary of the Department of the Interior of the United States, respectfully states—

That he has been served with notice of an order or rule from this honorable court to show cause why a writ of mandamus should not be issued from the said court, directed to him as the Secretary of the Department of Interior, one of the executive departments of the United States, upon the petition of William McGarrahan, commanding him to issue or cause to be issued a patent for certain lands claimed by the said petitioner, and fully described in the aforesaid petition.

And the undersigned submits to your honors that from said petition and accompanying exhibits, setting forth the official action of the
52 undersigned, and the reasons moving him thereto, it appears that your honors have not jurisdiction in the matter of said petition and cannot grant the writ prayed for by said petitioner—

1st. Because the subject-matter of the petition is purely of executive cognizance, resting in the judgment and discretion of executive officers in the ordinary discharge of their official duties.

2. Because the subject-matter is one in which judgment and discretion are to be exercised.

3. Because the issuance of patents for lands is by statute the duty of the President of the United States.

O. H. BROWNING,
Secretary of the Interior.

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In the supreme court of the District of Columbia, in banc, Jan'y term, 1869.

54 THE UNITED STATES, ON RELATION OF William McGarrahan,
vs.
O. H. BROWNING, SECRETARY OF THE INTERIOR.

It is stipulated in the above cause that the same be submitted to the court upon briefs and arguments, and that the said court may render its judgment in vacation, as of the present term, and as of the day of such submission.

Feb'y 5, 1869.

A. L. MERRIMAN, *for Relator.*
NATH'L WILSON, *Ass't U. S. Att'y.*

Adjourned till 10 o'clock to-morrow morning.

SATURDAY, *February* 6, 1869.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin & Wylie. Absent, Justice Fisher, holding the criminal court.

McGARRAHAN, RELATOR,
vs.
O. H. BROWNING, SECRETARY OF THE INTERIOR, respondent. } At law.—No. 5348.

Argued by Mr. Merriman for relator, and Mr. N. Wilson for respondent.

55 *Order, general term, to issue writ of mandamus:—Filed July 8, 1869.*

In the supreme court of the District of Columbia, sitting in general term, this 6th day of February, A. D. 1869.

THE UNITED STATES, UPON RELATION OF William McGarrahan,
vs.
ORVILLE H. BROWNING, SECRETARY of the Interior.

And now on this day this cause came on to be heard upon the petition and answer filed in said cause, and the counsel therein respectively having submitted said cause for hearing upon the said petition, answer, and their respective briefs and arguments, in accordance with their stipulation filed on the 5th inst., and the court being fully advised in the premises, do hereby order. judge, and decree that the prayer of the said relator be granted, and that a writ of mandamus issue from this
56 court, under the seal thereof, and attested by the clerk of the same, directed to the said Orville H. Browning, Secretary of the Interior, or to his successor in office, directing and commanding him, the said Secretary of the Interior, to issue, or cause to be issued, to the said

William McGarrahan, upon the payment by him to the United States of the sum of twenty-two thousand two hundred and ten dollars and ninety-six cents (being at the rate of one dollar and twenty-five cents per acre) a patent from the United States, conveying to the said William McGarrahan the tract of land, described in said petition, to wit, a certain tract of land called Panoche Grande, of the extent of four square leagues or thereabouts, now lying in the counties of Monterey and Fresno, in the State of California, bounded as follows: On the north, by the lands of Don Julian Ursua; on the south, by the Serrania; on the east, by the Tulare Plains, or Valley of Tules; and on the
57 west, by the lands of Don Francisco Arias, which said tract is more particularly bounded and described in the survey made by the United States surveyor general for the State of California, approved September 11, 1862, as follows:

Beginning at corner of sections 2, 11, 1, and 12, T. 17 S., R. 11 E., Mount Diable meridian; then according to true meridian, the variations of the magnetic needle being 15 deg. 30 min. east; thence north, 40 chains; west, 80 chains; north, 40 chains; west, 80 chains; north, 40 chains; west, 100 chains; south, 100 chains; east, 20 chains; south, 60 chains; east, 80 chains; south, 40 chains; east, 120 chains; south, 60 chains; east, 20 chains; south, 20 chains; east, 60 chains; south, 200 chains; east, 82 chains and 15 links; south 280 chains; west, 20 chains; south, 60 chains; east, 20 chains; south, 20 chains; east, 60 chains; north, 60 chains; east, 20 chains; north, 20 chains; east, 20 chains;
58 north, 40 chains; east, 20 chains; north, 80 chains; east, 40 chains; north, 60 chains; east, 20 chains; north, 20 chains; east, 20 chains; north, 80 chains and 40 links; west, 40 chains; north, 280 chains; west, 40 chains; north, 40 chains; west, 40 chains; north, 40 chains; west, 200 chains and 38 links.

Aggregate of exterior boundaries (2,882 chains and 93 links), thirty-six miles two chains and 93 links, and containing, according to the survey aforesaid, 17,768$\frac{77}{100}$ acres of land, and being designated on the plat of public surveys, as—

Lot No. 37, T. 16 S., R. 11 E.
Lot No. 37, T. 17 S., R. 11 E.
Lot No. 37, T. 17 S., R. 12 E.
Lot No. 37, T. 18 S., R. 12 E.
} Mount Diable meridian.

This order and decree is entered as of the day of the submission of the same to the court as aforesaid, in conformity with the stipulation of the parties hereinbefore mentioned, the said cause having been held under advisement by the said court.

A. B. OLIN.
GEO. P. FISHER.

59 *Writ of mandamus.—Issued July* 8, 1869.

In the supreme court of the district of Columbia.—July 8, 1869.

THE UNITED STATES, ON THE RELATION of William McGarrahan, *v.* ORVILLE H. BROWNING, SECRETARY OF the Interior. } At law.—No. 5348.

The President of the United States to Orville H. Browning, Secretary of the Interior, or his successor in office, greeting:

Whereas the relator aforesaid has shown to said court that, in the year 1857, he purchased from Vincent Gomez a grant of land in Cali-

fornia, known as Panoche Grande Rancho; and that, under the provisions of the seventh section of the act entitled "An act to quiet titles in California," approved July 23, 1866, he made application to the
60 Secretary of the Interior for the purchase of the same at the minimum price established by law, and made proof of the fact of the purchase first aforesaid satisfactory to the Secretary of the Interior, and tendered to said Secretary the sum of money required by said law for said purchase after the survey of said lands by the surveyor general of the United States for California, and that no valid adverse title to said lands exists, except in the United States; and that the Secretary of the Interior refused to accept said tender, and to issue a patent for said lands to the relator, to the great damage, grievance, and prejudice of said relator, as by his complaint to said court appears:

Therefore you are hereby commanded to issue, or cause to be issue, to the said William McGarrahan, upon payment by him to the United States of the sum of twenty-two thousand two hundred and ten dollars and ninety-six cents, being at the rate of one dollar and twenty-
61 five cents per acre, a patent from the United States, conveying to the said William McGarrahan the tract of land described in his complaint to said court, to wit: A certain tract of land called Panoche Grande, of the extent of four square leagues, or thereabouts, lying in the counties of Monterey and Fresno, in the State of California, bounded as follows: On the north by the lands of Don Julian Ursua, on the south by the Serrania, on the east by the Tulare Plains, or Valley of Tules, and on the west by the lands of Don Francisco Arias, which said tract is more particularly bounded and described in the survey made by the United States surveyor general for the State of California, approved September 11, 1862, as follows: Beginning at corner of sections 2, 11, 1, and 12, T. 17 S., R. 11 E., Mount Diable meridian; then, according to true meridian—the variations of the magnetic needle being 15 deg. 30 min. east; thence north, 40 chains; west, 80 chains; north,
62 40 chains; west, 80 chains; north, 40 chains; west, 100 chains; south, 100 chains; east, 20 chains; south, 60 chains; east, 80 chains; south, 40 chains; east, 120 chains; south, 60 chains; east, 20 chains; south, 20 chains; east, 60 chains; south, 200 chains; east, 82 chains and 15 links; south, 280 chains; west, 20 chains; south, 60 chains; east, 20 chains; south, 20 chains; east, 60 chains; north, 60 chains; east, 20 chains; north, 20 chains; east, 20 chains; north, 40 chains; east, 20 chains; north, 80 chains; east, 40 chains; north, 60 chains; east, 20 chains; north, 20 chains; east, 20 chains; north, 80 chains and 40 links; west, 40 chains; north, 280 chains; west, 40 chains; north, 40 chains; west, 40 chains; north, 40 chains; west, 40 chains; north, 40 chains; west, 200 chains and 38 links; aggregate of exterior boundaries, 2,882 chains and 93 links—thirty-six miles two chains and 93 links, and containing, according to the survey aforesaid, $17{,}768\frac{77}{100}$ acres of land, and being designated on the plat of public surveys as—
63 Lot No. 37, T. 16 S., R. 11 E.; lot No. 37, T. 17 S., R. 11 E.; lot No. 37, T. 17 S., R. 12 E.; lot No. 37, T. 18 S., R. 12 E., Mount Diable meridian.

Witness, D. K. Cartter, chief justice of said court.

[SEAL.] R. J. MEIGS, *Clerk.*

Marshal's return.

Served the within writ on J. D. Cox, Secretary of the Interior, by reading the same to him July 8th, 1869; also served copy of within writ this 9th of July, 1869.

A. SHARP, *Marshal.*

64 *Appeal from order of general term to Supreme Court United States.—Filed July* 8, 1869.

In the supreme court of the District of Columbia.

THE UNITED STATES, EX REL. WILLIAM MCGARRAHAN, vs. O. H. BROWNING, SECRETARY OF THE INTERIOR. } At law.—No. 5348.

The said respondent, by E. C. Carrington, U. S. attorney, prays an appeal to the Supreme Court of the United States from the decree and order of the court entered in the above-entitled case this 8th day of July, A. D. 1869.

E. C. CARRINGTON, *U. S. Att'y.*

65 *Motion to quash writ.—Filed Oct.* 28, '69.

In the supreme court of the District of Columbia.

THE UNITED STATES, ON RELATION OF William McGarrahan, vs. ORVILLE H. BROWNING.

Now on this 28th day of October, 1869, Jacob D. Cox, Secretary of the Interior, comes here into court, by his counsel, J. Hubley Ashton, for the purpose of giving the court to understand and to be informed—

1. That on the 6th day of March, 1869, he was appointed by the President of the United States to be Secretary of the Department of the Interior, one of the executive departments of the government of the United States, and that he now holds and exercises that office.

2. That, on or about the 8th day of July last, he was served with a writ of mandamus, directed to Orville H. Browning, Secretary of the Interior, or his successor in office, purporting to have been issued
66 by this honorable court, on the 8th day of July last, in a certain cause or proceeding depending in this court, entitled "The United States, on the relation of William McGarrahan, vs. Orville H. Browning, Secretary of the Interior," and commanding Orville H. Browning, Secretary of the Interior, or his successor in office, to issue or cause to be issued, to the said William McGarrahan, upon payment by him to the United States of the sum of twenty-two thousand two hundred and ten dollars and ninety-six cents (being at the rate of one dollar and twenty-five cents per acre), a patent from the United States, conveying to the said William McGarrahan, the tract of land particularly described in said writ, as will appear by reference thereto.

3. That it appears, by the record of the proceedings of this honorable court in the said cause, that the said writ of mandamus was issued
67 from this court, under, and in pursuance of, a certain order, or decree, signed by two of the honorable justices of this court, and filed in the office of the clerk of this court on the 8th day of July, 1869, during a vacation of this honorable court, as of the 6th day of February, 1869, which said order or decree, although purporting on its face to be the order, judgment, and decree of this honorable court, does not purport to have been made and entered by the order, or under the authority, of this honorable court, all of which will more fully appear by reference to the record of the proceedings of this honorable court in said cause.

4. That the said record further shows, as will appear by reference

thereto, that a petition for a writ of mandamus, directed to Orville H. Browning, his predecessor in the office of Secretary of the Interior, commanding him to issue, or cause to be issued, a patent for the land above referred to, to the said McGarrahan, was filed in the office of the clerk of this court, on the 3d day of December, 1868; and there-
68 upon a rule was executed upon the said Orville H. Browning to show cause, on the 3d Monday of January, 1869, before this honorable court, sitting in general term, why said writ of mandamus should not issue; that on the 26th of January, 1869, the said Orville H. Browning filed a return or answer to the said rule, in the nature of a plea to the jurisdiction of this court, to grant the prayer of the said petition, denying, inter alia, that this honorable court had any jurisdiction of the subject-matter of the case stated in said petition; that subsequently, to wit, on the 5th day of February, 1869, an agreement was entered into between the counsel of the said petitioner or relator, and the assistant district attorney, as counsel of the said Orville H. Browning, stipulating that the judgment of the court upon the said petition and return might be rendered in vacation, as of the January term, 1869, then pending, when said agreement was made, and as of the day of the sub-
69 mission of the case to the court upon said petition and return by the respective counsel; and that on the 8th day of July, 1869, when this honorable court was not in session, the said order or decree was signed and filed, as aforesaid, by two of the honorable justices of this court.

5. That he has been informed and believes, that, subsequent to the date of the said agreement of counsel, there was a session of this honorable court in general term, which terminated on or about the day of April, 1869, and that it was the purpose and intention of said counsel, in entering into said agreement, to enable this honorable court to render its judgment upon said petition and return during the vacation next succeeding the session of the court in general term, during which the said agreement was made, and as of the day of the submission of the case during that term; and not to consent to, or authorize, the
70 rendition of a judgment during any other and subsequent vacation, as of that term; and that consequently, upon the expiration of the said vacation, all authority under the said agreement, for the rendition of a judgment, during vacation as of the January term 1869, terminated.

6. That after the submission of the said case to the court upon the said petition and return, which occurred on the 6th day of February, 1869, and before the entry of the said order or decree by two of the honorable justices of this court as aforesaid, the defendant in the said case, Orville H. Browning, retired from the office of the Secretary of the Interior, and he was appointed thereto; but that no proceedings were had or taken by or on behalf of the relator to revive the said suit against him, or make him a party thereto; and that his first knowledge of the said action of the said honorable justices of this court therein was obtained from the copy of the said writ of mandamus served upon him as aforesaid.

71 7. That he is advised that no final judgment awarding a peremptory mandamus against the defendant, Orville H. Browning, or any successor in the office of the Secretary of the Interior, could be regularly and properly entered by the court upon the pleadings above mentioned; and that until some further answer or return to said rule to show cause by the said Orville H. Browning, setting up the facts touching the claim of the said relator to the said land, and the adverse claims

and rights thereto, before the Department of the Interior for adjudication and determination, no such judgment or decree as that signed by two of the honorable justices of this court could regularly or properly be entered by this honorable court.

8. That the impropriety and irregularity of such a judgment or decree upon the pleadings heretofore mentioned becomes more clearly manifest upon a consideration of the terms and provisions of the 7th section
72 of the statute of July 23, 1866, entitled "An act to quiet land titles in California," upon which the claim of a right to a patent from the United States for the tract of land in question is alone placed by the said relator in his petition aforesaid, which do expressly except from the operation of the said seventh section of said act, and from the right to purchase therein given, "lands containing mines of gold, silver, copper, or cinnabar," and of the fact that within the limits of the said tract of land there was and is a mine of cinnabar, which could not and cannot, therefore, be embraced by any patent issued under the authority and pursuant to the provisions of the said 7th section of the act of July 23, 1866. A patent for said mine, or for the premises occupied by it, could not and cannot lawfully be issued by the executive department of the government under that law. Furthermore, before and at the time he was appointed to the office of Secretary of the Interior, a claim had been
73 made and filed to said mine of cinnabar, by and on behalf of a certain company or association of persons styled the New Idria Mining Company, and to a patent therefor under and in pursuance of the act of July 23, 1866; which said claim was and is subject to the judicial cognizance and power of the Commissioner of the General Land Office, and, in the exercise of his supervisory and appellate authority over the acts and doings of that officer, of the Secretary of the Interior. The validity of said claim of the said mining company, and the extent and character of its interference with the said claim of the relator, were and are, under existing laws, questions within the exclusive jurisdiction of the Department of the Interior, which jurisdiction can only lawfully be exercised conformably to the statutes of the United States in such cases made and provided, as understood and expounded by that department. Whereupon, and in consideration of the premises, and the
74 manifest invalidity of the said writ of mandamus issued as aforesaid, the said Jacob D. Cox, Secretary of the Interior, prays the consideration of the court here, and moves the court—

1st. That the said writ of mandamus heretofore, to wit, on the 8th day of July last, issued from the office of the clerk of this honorable court, and directed to the said Orville H. Browning, Secretary of the Interior, or his successor in office, be quashed.

2d. That the said order and decree, signed as aforesaid by two of the honorable justices of this court, and filed in the office of the said clerk on the 8th day of July last, be vacated, annulled, and set aside.

J. HUBLEY ASHTON,
Of Counsel for Jacob D. Cox, Secretary of the Interior.

Motion to quash withdrawn.

THE UNITED STATES, ON THE RELATION OF William McGarrahan, petitioner, *vs.* ORVILLE H. BROWNING, SECRETARY OF THE Interior, respondent. } At law.—No. 5348.—In general term. Nov. 27, 1869.

75 And now comes here the Secretary of the Interior, by Mr. Ashton, his attorney, and by leave of the court withdraws his afore-

said motion to vacate the judgment aforesaid and quash the writ of mandamus issued in this case, and to set aside the judgment ordered thereon on the 8th day of July, 1869.

CLERK'S OFFICE, SUP. CT., D. C.,
District of Columbia, to wit:

I, Return J. Meigs, clerk of the supreme court of the District of Columbia, hereby certify that the foregoing 74½ pages of paper writing are truly copied from originals on file and of record in the clerk's office of the said court, which originals constitute the whole record in the above-entitled cause.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office the 9th day of December, 1869.

[SEAL.] R. J. MEIGS, *Clerk.*

76 (Indorsement on record:) Dist. of Columbia sup. court. No. 337. Jacob D. Cox, Secretary of the Interior, plaintiff in error, vs. the U. States, ex rel. William McGarrahan.

Filed 10th December, 1869.

Jno. Clifford

Supreme Court of the United States.

JACOB D. COX, Secretary of the Interior, plaintiff in error,

vs.

THE UNITED STATES, on relation of William McGarrahan, def't in error.

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DEFENDANT'S BRIEF.

This writ of error ought not to be entertained for two reasons.

I.

On page 19 of the record is contained a stipulation entered into between the parties in the court below, by which the said cause was agreed to be submitted to the court, and that the court might render its judgment in vacation, and to be entered as of the term of said court then in session, and of the day of such submission.

The effect of this stipulation was to place the cause beyond the power of either party to prosecute a writ of error in accordance with the provisions of the judiciary act, as required to operate as a supersedeas, the writ of error being required to be taken within ten days from the date of the judgment. It was, therefore, without the ordinary course of law, and consequently a writ of error will not lie from such judgment.

2 Bacon's Ab., 452.
Van Dusen *vs.* Comstock, 3 Mass., 187.
Melvin *vs.* Bridge, 3 Mass., 305.
Brown *vs.* Stimson, 2 Mass., 445.

This stipulation was in the nature of an agreement of arbitration, and was an agreement to accept the opinion of the court to which it was submitted as the proper judgment in the case, and became a judgment by consent, from which no writ of error lies.

Alfred *vs.* Saco, 7 Mass., 380.
Carroll *vs.* Richardson, 9 Mass., 329.
Gray *vs.* Stone, 10 Mass., 165.
Noble *vs.* Jewett, 2 Chip., 36.
Withington *vs.* Strattan, 11 Mass., 394.

In the latter case the court say: "The principle established is, that when the parties have agreed that a certain judgment shall be rendered for either of them, according to the opinion of the judge, upon a case stated, the court of errors cannot rescind that agreement and enter a different judgment. It is the same in principle as if they had agreed that judgment should be entered according to the opinion of any other individual, or that it should depend upon any other collateral event. When the opinion is given, or the other event happens, and the judgment is entered accordingly, it is so entered by the consent or agreement of the parties, in like manner as if they had in any other manner ascertained what was right and just between them, and had afterwards come into court and consented to a judgment accordingly."

This principle has been frequently sustained by this court, (Graham *vs.* Bayne, 18 Howard, 60,) in which the court say, that the parties to a suit cannot by agreement introduce a new practice in this court, and further say: "If the parties agree to submit the trial both of fact and law to the judge, they constitute him as an arbitrator between them, but no consent can constitute this court appellate arbitrators." Also to the same effect,

Kelsey *vs.* Forsyth, 21 How., 85.
Guild *vs.* Frontin, 18 How., 135.
Campbell *vs.* Boyrean, 21 How., 224.
Snyder *vs.* Williamson, 20 How., 427, 433.

Where the court say: "Where a party is dissatisfied with the decision of his case in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be raised against them on the record for the information of the appellate tribunal, and if he omits to do so in any of the method sknown to the practice of such courts, he must be content to abide the consequences of his own neglect."

An agreement to refer a suit pending to an arbitrator, and that judgment be entered in conformity with his decision, will justify the entry of a judgment accordingly, which judgment will be binding upon the parties as a judgment by consent.

Bank of Monroe *vs.* Wilson, 11 Paige, 533.
Yates *vs.* Russell, 17 John., 465.
Forsyth *vs.* Shaw, 10 Mass., 253.
Hecker *vs.* Fowler, 2 Wallace, 133.

If there were any doubt as to the effect of the stipulation, such doubts are cleared up by an inspection of the supplementary record, which shows that on the 3d of May the said cause was dismissed through a misapprehension of the clerk of the statements of the respondent's counsel, which was corrected, and the cause reinstated upon the written statement of the counsel for respondent, Browning, filed on the 21st of May, 1869, as follows: "The case above entitled was heard by the court in Banc, at the term before the last, and was taken by the court under advisement. When the case was called at the last term, (meaning the May term,) I remarked that it ought to be 'off' of the calendar, as it had been argued and submitted to the court. If any other entry has been made, such entry is erroneous, as the case is still *pending and undetermined.*" This also disposes of the objection, that the stipulation only was intended to extend during *one* vacation.

II.

The record (p. 22) shows that on the 28th of October, the plaintiff in error filed a motion in the court below to vacate and set aside the said judgment for the identical errors and

irregularities alleged to have been committed that are now set up as the foundation of this writ of error, which motion was, *before any decision thereon* by the court to which it was addressed, *withdrawn, and the motion dismissed by the party making it.*

The withdrawal or dismissal of said motion was a waiver of all objections then made.

Forney *vs.* Washington Territory, 1 Wash. Ter. Rep., 14.

By the long prevailing practice of the courts, it is necessary that any irregularity in the proceedings of the courts should be brought to the notice of the court upon motion, and if no motion is made for that purpose, such irregularity is waived.

Moody *vs.* Vreeland, 9 Wen., 125.

Cook *vs.* Moseby, 13 Wen., 277.

When a party is in court, it is held that every failure to assert a legal right during the progress of a cause is a waiver of that right, and no writ of error will lie, unless objections are made to the proceedings, or the right asserted in the court below at the proper time.

Stump *vs.* Frisby, 7 Ind., 679.

Preston *vs.* Smedford, 21 Ind., 152.

Ingersoll *vs.* Bostwick, 22 N. Y. Rep., 425.

Commonwealth *vs.* Sowell, 9 Met., 572.

Wright *vs.* Moon, 11 Harris, 131.

The court, in the case cited in 7 Indiana, say, the reason of the rule being to direct the attention of the court particularly to the objection and the grounds of it, so that if erroneous it may re-examine it and correct it.

In this case, however, after making the motion, and directing the attention of the court to the objections, the party voluntarily abandons them. So, also, when a demurrer is interposed and overruled, a pleading thereafter is a waiver.

United States *vs.* Boyd, 5 How., 31.

The *irregularities* complained of, and now urged upon this court, are as follows:

1. That judgment was entered upon the merits in a case where the defendant had, in his return to the alternative writ, only set up a plea to the jurisdiction of the court. The alternative writ was in the nature of a rule to show cause why a peremptory writ of mandamus should not issue. Upon the coming in of the return to such rule, all the court can do is to determine whether upon the petition and return the writ shall issue. And *what is not answered in the return made must be looked upon as admitted to be true.*

12 Petersdorff Ab., 523.

Rex *vs.* Buckingham, 10 Mod., 174.

Rex *vs.* Mayor of Norwich, 2 Lord Raymond, 1244, 1267.

Rex *vs.* Shaw, 12 Mod., 325, 410.

Rex *vs.* Owen, 5 Keim, 669.

If the return be adjudged insufficient, a peremptory writ of mandamus issues.

Moses on Mandamus, 233.

If judgment be given for a party suing out a writ of mandamus upon demurrer, plea, or traverse, a peremptory writ will issue without delay.

Commonwealth *vs.* Alleghany Co., 32 Pa., 218, 221.

People *vs.* State, 2 Barbour, 397, 554.

2. That the writ improperly issued against the nominal defendant *or his successor in office.* The judgment being, by the terms of the stipulation, entered as of the 6th of February, 1864, was valid as against the defendant in said suit, and the act to be performed under said writ, being an official act, and not a personal act, such judgment was equally obligatory upon the successor in office of the defendant in the judgment, and the writ might properly issue, directed to the officer, without naming him.

See The People *vs.* Collins, (19 Wendell, 56, 68,) in which case the doctrine is clearly stated and the grounds thereof; that court saying, in conclusion, in that case: "The obligation sought to be enforced devolves upon no particular set of

commissioners, and no right is in question which will expire with the year. The duty is perpetual upon the present commissioners of Smyrna *and their successors*, and the peremptory writ may be directed to and enforced upon the commissioners of the town generally. To say otherwise would be a sacrifice of substance to mere form."

3. That the judgment was signed in vacation.

The practice of entering judgments in vacation by consent has been of long standing in the courts of this country and in England, and I will simply refer the court to the case of Hecker *vs.* Fowler, 2 Wallace, 133, which has already been referred to, it being a case where a judgment was entered upon the coming in of the report of a referee by stipulation; the agreement in that case in effect waiving the right of filing exceptions to such report before judgment.

4. That the judgment was signed by only two of the justices of the court.

The judgment, as such, was not signed by either of the justices of said court, but purports on its face to be the judgment of the court, and it is so entered by the clerk of said court; but appended to the judgment is an order signed by two of the justices, directing the clerk to enter the judgment as of the day of its submission, in conformity with the stipulation of the parties. The record on its face is correct, and this is not the manner of impeaching it.

Objection is also made that the petition in this case does not negative one of the provisos in the section of the act upon which it was based.

The section referred to contains three several provisos: One that the provisions of said section shall not apply to a certain locality; one that it shall not apply to lands containing mines of gold, silver, copper, or cinnabar; and one relating to the survey of such lands in reference to permanent improvements.

The rule of pleading was laid down by the court in the case of Jones *vs.* Axar, (1 Lord Raymond, 119,) as follows:

"When an exception is incorporated in the body of the clause he who pleads the clause ought to plead the exception; but when there is a clause for the benefit of the pleader and afterwards follows a proviso which is against him, he should plead the clause, and leave it to the adversary to show the proviso." Also to the same effect—

King *vs.* Bryan, 1 Story, 110.
Bennett *vs.* Hind, 3 Johnson, 438.
Tul *vs.* Fonda, 4 Johnson, 304.
Hart *vs.* Ellis, 8 Johnson, 41.
Railroad Co. *vs.* Robeson, 5 Iredell, 341.

Attached to the petition is the survey of said land, certified by the surveyor general of the United States for California, together with other exhibits.

It appears that one of the reasons made in the motion below by the present plaintiff in error, and successor of the original respondents, for setting aside said judgment, is, that there is a mine of cinnabar within the limits of said tract. This fact, if true, was a good ground for such a motion, so that the court below might correct its judgment in that respect; but, as such motion was abandoned, this court cannot consider it.

III.

The return of the defendant below sets up as a defence the following:

1. That the subject-matter of the petition is purely of executive cognizance, resting in the judgment and discretion of executive officers in the ordinary discharge of their official duties.

2. That the subject-matter is one in which the judgment and discretion are to be exercised.

3. That the issuance of patents is by statutes the duty of the President of the United States.

The power to issue writs of mandamus is, it is true, confined purely to executive or ministerial acts, and not to such acts

as may require in their exercise any judicial determination, or when the officer may have proper discretion in the matter of execution.

The section of the act under which this application was made was in the nature of a proposition of sale by the United States to certain parties of certain lands, at a certain price; such proposition being based upon the further moral consideration that these parties had once purchased the lands in good faith from other parties, and had occupied and improved the same. When, therefore, the party or parties to whom this proposition is made—they being the parties embraced in the act—accept the proposition, such acceptance becomes a contract, and an offer of performance thereunder on his part entitles him to a performance upon the part of the Government, and the duties of the executive officers are simply ministerial: to receive the money and issue the patents. But, before reaching this point, there are certain facts to be determined by the executive, that is, whether the party claiming to purchase under the provision of the act is *the party* to whom the proposition is made. That is a matter of judgment and discretion in the officer, and in the exercise of such judgment or discretion he cannot be controlled; but, having exercised such judgment or discretion in favor of the party, his duties then cease as to their judicial character, and become ministerial in nature.

In this case the judicial functions of the executive had been exercised, and the officer had found the facts in favor of the relator, and this proceeding was simply to compel the execution of certain ministerial acts founded upon a judgment already made.

In considering the third reason assigned in the plea of the defendant, it is proper to examine, not only the acts of Congress relative thereto, but also the general powers and duties of the heads of the respective executive departments.

The 1st section of the act of April 25, 1812, (2 Stats., 716,) provides: "That there shall be established in the Department of the Treasury an office to be denominated the General Land Office," thereby subjecting the General Land Office to the general superintendence of that Department.

Section 8 of the same act provides:

"That all patents issuing from the said office shall be issued in the name of the United States and under the seal of said office, and be signed by the President of the United States, and countersigned by the Commissioner of the said office, and shall be recorded in the said office in books to be kept for such purpose."

The act of 4th July, 1836, (5 Stats., 107,) provides, in the 4th section, for a recorder, whose duty it shall be, in pursuance of instructions from the Commissioner, to certify and affix the seal of the General Land Office to all patents for public lands; and he shall attend to the correct engrossing, and recording, and transmission of such patents. The 6th section of the same act provides for the appointment of a secretary, whose duty it is, under the direction of the President, to sign in his name all patents, &c.

The Attorney General, upon the passage of the last recited act, was called upon for an opinion as to the effect of the act, and whether it placed the Commissioner of the General Land Office in a position independent of the Secretary of the Treasury. In reply, he states his opinion to be, that the clause of the act of 1812, which makes the Land Office a branch of the Treasury Department, is not repealed by the last-mentioned act, but says: "To prevent all difficulty, however, in respect to the power of the Secretary of the Treasury to superintend the business of the General Land Office, under the direction and control of the President, I would suggest the expediency of your authorizing and directing the Secretary of the Treasury, by order in writing, to superintend and direct, in the manner heretofore accustomed and with the usual subordination to the President, the general business of the Land Office." (See 2d Public Land Laws, Instructions and Opinions, page 104.)

The President, therefore, issued the following:

"WASHINGTON, *July* 4, 1836.

"I hereby direct, that under the act to reorganize the General Land Office, approved this day, the Secretary of the Treasury shall continue to exercise the same general power

over the said office and its various concerns which has heretofore been exercised by him, and which it may be legal for him to do under said act and the opinion thereon of the Attorney General.

"Given this day. ANDREW JACKSON."

(2d Public Land, &c., 104.)

On the 3d March, 1849, was, by law, established the Department of the Interior, (9 Stats., 395,) the 3d section of which provides, "that the Secretary of the Interior shall perform all the duties in relation to the General Land Office of supervision and appeal now discharged by the Secretary of the Treasury."

The General Land Office is therefore by statute a part and parcel of the Department of the Interior, and the officers thereof are subject to the direction of the Secretary of the Interior Department, and their acts subject to his supervision. It is his duty to see that the officers in his Department perform their duties. It is the duty of those officers to issue patents to lands to persons by law entitled to such patents. To one officer is delegated the duty of engrossing, recording, certifying, and affixing the seal of the Land Office, and issuing such patents; to another officer is delegated the duty of signing the name of the President to such patents.

Aside from this, and beyond the express powers granted by statute, the several heads of the departments are invested with full powers over all matters properly within the scope of their several departments, whether expressly delegated to them or not, and by virtue of the general rights of sovereignty.

Neilson *vs.* Lagow, 12 Howard, 101, and the cases therein cited.

The heads of the several departments act under the supposed authority of the President in all cases when not expressly authorized to act by statute, and all such acts are binding, unless expressly countermanded by the President; and when certain duties thereby devolve upon the President, the heads of the departments are by law the ministerial agents in the performance of such duties.

Little *vs.* Barrence, 2 Cranch, 170.

Lockington *vs.* Smith, 1 Peters C. C. R., 466.
Parker *vs.* The United States, 1 Pet. U. S. R., 293–296.
Wilcox *vs.* McConnell, 13 Peters U. S. R., 498–512.
United States *vs.* Eliason, 16 Peters U. S. R., 291–302.
Wilkins *vs.* United States, 1 How., 290.

It therefore follows, that each and every of these subordinate officers, including the Commissioner of the General Land Office, the recorder, and the secretary—the former and latter acting nominally under the direction of the President—are under the general supervision and direction of the head of the Interior Department.

The entire duties of issuing patents are performed by certain specified officers. The President is required to perform no personal act in the matter, and it will be observed that the same language of the statute is used in reference to the Commissioner as to the secretary for signing patents, each to act under the direction of the President of the United States. The rule being held that the Commissioner is subject to the supervision of the head of the Department, the same reason will apply to the application of the rule to the subordinate and strictly ministerial officer who affixes the signature to the patent.

In this case the Secretary not only does not direct his subordinates to perform the duty of issuing the patents to which the relator is entitled by law, but absolutely refuses to permit the initiative steps to be taken towards that result.

The Attorney General, in his brief, which I find published in the newspapers, has seen fit to criticise the conduct of the court below in a manner, as it seems to me, wholly unwarranted by the record. The petition sets forth the facts entitling the relator to a patent for the land claimed, and that these facts had been proven to the satisfaction of the Secretary of the Interior; that those facts had been determined by him, but that the Secretary refused to issue the patent without any just cause. This was not denied by the Secretary, but he simply interposed a denial of the jurisdiction of the court in the matter. The parties severally had full confidence in the

the judges of the court, and agreed that the court might take the case and decide what was just and right between them at its leisure. But to prevent a mis-trial by reason of any events that might happen, it was further agreed, that the judgment, when rendered, should be entered as of the date of submission.

As frequently happens when neighbors get into a dispute and agree to leave their differences to the arbitrament of a mutual friend, upon the publishing of the terms of settlement either the one or the other of the litigants becomes highly indignant at the umpire. The defendant, being dissatisfied with the decision of the umpire, adopted the only and true course, and applied to the court for a rehearing of the cause and to vacate the judgment for irregularities, but upon further consideration abandoned that motion, thus virtually saying to the court that he was satisfied with its judgment or award. After all this he has no standing in this court.

A. L. MERRIMAN,
Attorney for the Defendant in Error.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

JACOB D. COX, Secretary of the Interior, Plaintiff in error,
vs.
THE UNITED STATES, *ex. rel.*, Wm. McGarrahan.
} No. 337.

In error to the Supreme Court of the District of Columbia.

STATEMENT AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This record presents, we suppose, the most extraordinary exhibition of the unwarrantable exercise of judicial power, on the part of a court, that has ever been brought to the notice of this appellate tribunal.

On the 3d day of December, 1868, Wm. McGarrahan, the alleged purchaser of the claim of Vincent P. Gomez to the tract of land in California known as the *Panoche Grande Rancho*, filed a petition in the supreme court of the District of Columbia praying that a writ of mandamus might be issued, commanding the Hon. O. H. Browning, Secretary of the Interior, to issue, or cause to be issued, to him, McGarrahan, a patent for

the land alleged to be embraced by that claim. (Rec. pp. 2–5.)

The Gomez-McGarrahan claim is well known to this court. (23 How., 326; 1 Wall., 698; 3 Wall., 752.)

His right to demand and receive such a patent was placed in the petition upon the provisions of the 7th section of the act of July 23, 1866, entitled "An act to quiet land titles in California."

"That where persons, *in good faith and for a valuable consideration*, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have *used, improved, and continued in the actual possession of the same*, according to the lines of their original purchase, *and where no adverse right or title* (except of the United States) exists, such purchaser may purchase the same, after having such land surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts required in this section, *under regulations to be provided by the Commissioner of the General Land Office*, &c.: *Provided*, That the provisions of this section shall not be applicable to the city and county of San Francisco: *Provided, That the right to purchase herein given shall not extend to lands containing mines of gold, silver, copper, or cinnabar: Provided*, That, whenever it shall be made to appear by petition from the occupants of such lands that injury to permanent improvements would result from running the lines of the public surveys through such permanent improvements, the Commissioner of the General Land Office may recognize existing lines of subdivisions." (14 Stat at Large, 220.)

The petition of McGarrahan, not averring that proof

of the facts, as required by this law, had been made under the regulations of the Commissioner of the General Land Office, and without averring that the lands in question were *not* mineral lands, containing mines of gold, silver, copper, or cinnabar, and thus not excluded by the proviso from the operation of the statute, alleged simply that the facts stated in his application were proved, by the relator, to Mr. Browning, the Secretary of the Interior, and that he had found, from the proofs, that the relator, in good faith and for a valuable consideration, purchased the lands from Gomez.

Upon the showing made in this petition, the supreme court of this District, without notice to Mr. Browning, the Secretary of the Interior, ordered, on the 7th of December, a rule to issue, commanding him to show cause, on the 3d Monday of January, 1869, before the court sitting in general term, why the writ of mandamus prayed for should not issue. (Rec., p. 17.)

And, on the 26th of January, Mr. Browning filed a return, in the nature of a plea to the jurisdiction of the court, submitting simply the suggestion that the court had not jurisdiction of the subject-matter of the case, and could not grant the writ prayed for—

1st. Because the subject-matter of the petition was purely of executive cognizance, resting in the judgment and discretion of executive officers, in the ordinary discharge of their official duties;

2d. Because the subject-matter is one in which judgment and discretion were to be exercised; and

3d. Because the issuance of patents for lands is, by statute, the duty of the President of the United States. (Rec , p. 18.)

This question of jurisdiction appears to have been argued and submitted on the *6th of February*, 1869. (Rec., p. 19.)

And, on the *8th of July*, in vacation, an order or judgment was filed in the clerk's office, *nunc pro tunc*, as of 6th of February, directing that a peremptory mandamus issue, directed to Orville H. Browning, Secretary of the Interior, *or to his successor in office*, commanding him, the said Secretary, to issue, or cause to be issued, to McGarrahan, the relator, a patent for the tract of land, containing $17{,}768\frac{67}{100}$ acres, described in the petition, upon his paying to the United States the sum of $\$22{,}210\frac{96}{100}$.

This judgment appears to have been signed by two only of the honorable justices of the court below. (Rec., p. 20.)

On the same day a writ of mandamus was issued, directed to Mr. Browning, *or* his successor in office, commanding him to convey to McGarrahan these four leagues of land in Monterey and Fresno counties, California.

Four months before, as this court judicially know, Mr. Browning had retired from the office of Secretary of the Interior, and had been succeeded by the present incumbent, Honorable Jacob D. Cox.

And, accordingly, on the same day, the 8th of July,

this writ was served upon Mr. Cox, as one of the parties named in the *alternative* judgment. (Rec., p. 21.)

The record shows that no proceedings of any kind were taken, upon the retirement of Mr. Browning, to revive the suit against his successor, Mr. Cox, or to make him a party, and that no notice of the pendency of the case was ever given to him by the relator or by the court, or any requirement made of him to answer or reply to the application on its merits. He is introduced into the judgment *by the court* as an alternative defendant, and peremptorily required by the writ to issue a patent to the relator.

And this peremptory writ is issued upon a return, made four months before, by Mr. Browning, intended to raise, and in fact raising, only the question of jurisdiction, without any opportunity being afforded him or his successor to set forth the actual facts in regard to the land claimed by the relator.

A more remarkable fact, perhaps, than either, is that the Secretary of the Interior is required to issue a patent under the authority of a statute which expressly excludes and excepts mineral lands from its operation, without even an allegation, in the *ex parte* statement of the claimant, that the lands for which he seeks a patent are not within the exception of the law under which he claims.

For anything that appeared to the court below, it might be that their mandamus, as it embraces *all* land within the survey, would require the Secretary to give

this relator a patent for mines of gold, silver, copper, or cinnabar, which Congress had expressly prohibited from being conveyed to any claimant under the act of July 23, 1866, and for which Congress had expressly provided a different disposition, in another statute of July 26, 1866, (14 Stat. at Large, 251.)

The case thus presented by the record, is—

1st. A peremptory mandamus issued against the head of a department, in a suit instituted against his predecessor, to which the incumbent had never been made. or become, a party.

2d. A peremptory mandamus awarded against the head of a department, in a case arising under laws which it is *his* duty to administer and execute, upon an *ex parte* statement of a claimant before his department, without any exhibition, on the part of the government he represents, of the truth of the matter in controversy, and without any opportunity being afforded by the court for such exhibition of the matter thus sought to be subjected to judicial determination; and—

4th. A judicial order to the head of a department to issue a patent for lands, which the facts officially known to him might show to be lands that Congress had expressly excepted from the grant made in the 4th section of the act of July 23, 1866, under which the relator claimed.

We think that no instance of judicial usurpation of authority, quite so palpable and bold, has ever been brought to the attention of this court.

It appears by the record that Mr. Cox brought the subject of this case seasonably to the notice of the court, by proper motion, in the interest of the government, and requested a reconsideration of its action, (Rec., p. 22.) But the court failing to determine the motion in time for the present term of this court, the motion was withdrawn, and this writ of error was thereupon issued to reverse the judgment.

ARGUMENT.

FIRST.

This court has so repeatedly and so recently defined, in such clear and emphatic terms, the limits of the jurisdiction which may lawfully be asserted by the federal courts over the officers of the Executive Departments of the government, that it is surprising that any court of the United States should, in its judicial action, transcend those limits.

It was only a short time before the court below awarded this mandamus against the Secratary of the Interior, that this court decided the case of Gaines *vs.* Thompson, in which Mr. Justice Miller, in delivering the opinion of the court, took occasion to review the previous adjudications upon this subject, and to expound, in terms even clearer than had been before employed, the doctrine they all enunciate, that "an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions."

"Certain powers and duties," continues that learned justice, "are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason of this is, that the law reposes this discretion in him for that occasion, and not in the courts." (7 Wallace, 352.) The early case of McIntire *vs.* Woods, (7 Cranch, 504,) while holding that the circuit courts of the United States in the several States had no *general* jurisdiction, under the grant of power in the Judiciary Act, to issue writs of mandamus, decided, at the same time, that mandamus was the proper remedy, and can be issued against a federal officer only, in case where "some *ministerial* act is necessary to the completion of an individual right arising under the laws of the United States."

This case finally disposed of the question, so far as concerned the circuit courts of the United States in the several States, but left the question open in regard to the circuit court of the District of Columbia; and in *Kendall's* case, (12 Pet., 618,) it was decided that that court was vested with broader powers and jurisdiction in respect to the writ of mandamus than were possessed by the circuit courts in the States.

This decision did not pass without a most vigorous and elaborate dissenting opinion by Chief Justice Taney, who was clear in the position that the court of the District of Columbia did not possess the prerogative jurisdiction and powers of the King's Bench in England. (*Ibid., p.* 627.)

The majority of the court, however, being of a contrary opinion, the question arose as to the extent of this jurisdiction over the acts and doings of executive officers; and it was held that, in the exercise of the jurisdiction, the court could command the performance by such an officer only of "*a precise, definite act, purely ministerial,*" and about which he had *no discretion whatever.* Speaking of the act which the Postmaster General, under the statute then in question, was required to do, the court say, "the mandamus does not seek to direct or control the Postmaster General in the discharge of any official duty partaking in any respect of an official character, but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control." (*Ibid.*, p. 610.)

The reports of the decisions of this court contain *eight* cases in all, including Kendall's case, in which heads of departments and other executive officers were sought to be controlled by this prerogative writ of mandamus; but in not one of them, except the case of Kendall, was the attempted control sanctioned by this court.

These cases came up from this District. In two of

them only, *Kendall* vs. *The United States*, and the *Commissioner of Patents* vs. *Whitely*, (4 Wall., 522,) the court below issued writs of mandamus.

In the first, this court affirmed the judgment; and in the others it reversed the decision of the court below.

Of these eight cases, one was against the *Postmaster General*, (Kendall's case, 12 Pet., 524;) two were against the *Secretary of the Treasury*, (Reeside *vs.* Walker, 11 How., 272; United States *vs.* Guthrie, 17 How., 282;) *two* cases against the *Secretary of the Navy*, (Decatur *vs.* Paulding, 14 Pet., 497; Brashear *vs.* Mason, 6 How., 92;) *one* case against the Public Printer, (United States *vs.* Seaman, 17 How., 230;) one against the *Commissioner of Patents*, (Commissioner *vs.* Whitely, 4 Wall., 522;) and one against the *Commissioner of the Land Office*, (5 Wall., 563.)

In all of these cases the doctrine is enforced, as a fundamental principle of our political system, that the judiciary is forbidden to interfere with the exercise of executive discretion; or, as Mr. Justice Swayne expresses it, the writ of mandamus lies only where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion. (Commissioner of Patents *vs.* Whitely, 4 Wall., 563.)

SECOND.

It is indisputable that the duty imposed upon the executive officers who may be charged with the execution of the statute, under which the relator claims, is not

ministerial in its character, within the meaning of these authorities, but is in the highest degree *executive*, as that term is defined by the Chief Justice in the case of Mississippi *vs.* Johnson, (4 Wall., 498.)

1. In the case of U. S. *vs.* Seaman, (17 How., 230,) Chief Justice Taney shows, that the test is whether the officer is obliged to examine evidence and form his judgment before acting; for wherever that is to be done, he says, it is not a case for a mandamus.

In the case of U. S. *vs.* Guthrie, (17 How., 282,) Mr. Justice Daniel says:

"Whenever the right of judgment or discretion exists in him, (the officer,) it is he, not the courts, who can regulate its exercise."

In Gaines *vs.* Thompson, (7 Wall., 353,) Mr. Justice Miller said: "the validity of plaintiff's entry, which is involved in their decision, (that of the officers of the Land Department,) is a question which requires the *careful consideration and construction of more than one act of Congress.* It is far from being a ministerial act, under any definition given by this court."

In the case of U. S. *vs.* the Commissioner of the Land Office, (5 Wall., 563,) where the application was for a mandamus to compel the issuing of a patent, Mr. Justice Nelson said, the case "calls for the exercise of the *judicial functions* of the officer, and these of no ordinary character. The duty is not merely ministerial, but involves judgment and discretion, which cannot be controlled by this court."

2. It would not be difficult to show that the authority and duty of the officers of the Land Department, in regard to the issuing of patents for lands of the United States, are not ever ministerial in character, but always rest in executive judgment and discretion.

But as the present application was expressly based upon the provisions of the act of July 23, 1866, cited at length above, it is sufficient to remark, that the slightest inspection of the 7th section of that act will show that it devolves upon the Land Department executive duties and judicial functions of the highest and most delicate character, which must be exclusively performed by its officers without interference by any court.

The law has invested them with exclusive authority to determine every question of fact and law arising under that act; and it is simple usurpation for any court to attempt to control their judgment and discretion.

The right of preëmption therein given to the assignees of rejected Mexican grants depends upon a variety of facts and conditions, which must be established to the satisfaction of and according to the rules provided by the Commissioner of the Land Office; whether they purchased in good faith, and for valuable consideration; whether they have used, improved, and continued in the possession of the land in the manner prescribed by the statute; whether any valid adverse title or right exists; whether the land has been properly surveyed; whether the facts have been proved "under the regulations of

the Commissioner of the General Land Office;" whether the lands are within the excepted locality; and, finally, whether the lands contain mines of gold, silver, copper, or cinnabar.

Such lands cannot be entered under the statute; nor can any entry be allowed until the proper officers are satisfied that the conditions and requirements of the statute have been duly fulfilled. It may well be said that an application under this statute "calls for the exercise of the judicial functions of the officers, and these of no ordinary character."

THIRD.

It would have been most extraordinary if the court below had issued a mandamus upon this application, after an exhibition of the facts of the case on the part of the Secretary of the Interior; but the judicial astonishment must be increased by the fact disclosed by the record, that, without a return, disclosing the facts in regard to this land and this application for a patent, the court below ventured to command the issuing of a patent for the entire tract.

Mr. Browning's return, as has been stated, was intended to raise a simple question of jurisdiction upon the face of the 7th section of the act of 1866. The facts of the case of this relator were not disclosed. Upon that return the court awarded a peremptory mandamus—*a final judgment upon a plea in abatement!* The court, without being informed, or requiring or

desiring information, as to the actual situation of the land, assumed not only that the facts were as the statute required, in order to give a right under it, but that upon those facts nothing was left to the judgment of the Land Department, and a mere ministerial duty devolved upon it to issue a patent to the relator.

No inquiry was made as to whether the lands were mineral lands, and thus excepted from the statute; and a patent for all the land embraced by the alleged survey—whether or not it contained the excepted mines—was ordered to issue to the claimant.

Mineral lands are not only excepted from this act of July 23, 1866, but they are differently disposed of by the act of July 26, 1866, (14 Stat., 252.) And, for any thing that appeared to the court below, this entire tract was not only within the exception of the first statute, but had been disposed of also to other parties, conformably to the later law.

It is plain that such a judgment is without warrant of law, and void.

FOURTH.

Great as was the error of the court below in rendering a final judgment in this proceeding as against the defendant, Mr. Browning, its error in rendering such a judgment against his successor, Mr. Cox, was still more flagrant.

Mr. Cox was not in any way made a party to the proceedings or served with any notice of its pendency.

His first knowledge of it, as the record shows, was obtained from the writ in which he was commanded to issue this patent.

The proceeding had evidently abated on the retirement of Mr. Browning.

At common law proceedings for mandamus abated by the death or resignation or removal from office of the defendant, and it required a statute to prevent this effect in certain cases, and to revive the proceedings against the successors in office or right of the parties against whom they were instituted.

This was the act of 1 William, 4, c. 21, sec. 5. (Tapping on Mandamus, 414, 496.)

As this statute has no force or application in this country or in this case, the common-law principle prevails in regard to the proceeding.

And that such a proceeding must necessarily abate upon the retirement from office, before judgment, of the responsible defendent, clearly appears from two considerations that may be briefly indicated.

The first is, the imperative rule of the law of mandamus that, previously to the making of the application to the court for a writ to command the performance of any particular act, an express and distinct *demand* or request to perform it must have been made by the prosecutor to the *defendant*, who must have refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively implied. (Tapping on Mandamus, 283.)

A demand on Mr. Browning was not, in fact or in law, a demand upon his successor, who must, equally with his predecessor, have the option of doing or refusing to do that which is required of him, before any application to compel him shall be made.

The second is, the doctrine of this court which has limited the power of the courts to issue this writ, to cases of acts required by law of the *individual* rather than of the *functionary*—a doctrine explained by the court in *U. S.* vs. *Guthrie*, 17 How., 282, and in *Kendall's* case, 12 Pet., p. 614. In the latter case, the court say of the act there required, "this was *not* an *official* act in any other sense than being a transaction in the department where the books were kept."

It might well be in any case, that while a particular incumbent had refused to perform an act required by law, his successor would not refuse, upon proper demand being made. The law, therefore, entitles the *successor* to the same opportunity to comply or refuse, as was given to the incumbent against whom the suit is brought. The judgment rendered, therefore, against the present Secretary of the Interior is a nullity.

FIFTH.

We understand this court to have, in effect, determined that the duty and power of issuing patents does not devolve upon the Land Department, or upon the Secretary of the Interior, who is vested with supervisory and appellate authority over that Department, in such a

sense as to render the Commissioner of the Land Office or the Secretary of the Interior, liable in any case to be proceeded against in this form of action. This view we suppose to be expressed by the decision in the case of U. S. *vs.* Commissioner of Land Office, (5 Wall, 563,) where Mr. Justice Nelson, in delivering the opinion of the court, took occasion to say, that "Patents are to be signed by the *President* in person, or in his name by a secretary under his direction, and countersigned by the Recorder of the General Land Office."

Act March 2, 1833, 4 Stats., 663.

Act March 3, 1841, 5 Stats., 417.

No patent for lands can be issued and delivered to any party without the signature of the President of the United States; and a proceeding that seeks to compel the issuing of such a patent must be brought against the President, and can be maintained against no other officer, under the existing system.

But, independently of this fact, a proceeding against the Secretary of the Interior to enforce a supposed right under the 7th section of the act of July 23, 1866, is palpably a mistaken one, as that statute in express terms vests the Commissioner of the Land Office with the responsible power and duty of administering that law, and over his acts the Secretary of the Interior exercises only an appellate and supervisory authority.

And a petition against him which fails to allege such compliance with the regulations of the Land Office as the statute requires, and does not show any primary

and preliminary consideration and action by the Land Office, in conformity with its regulations and methods of procedure, lacks the only foundation, even in the nature of proper averment, which could give color of jurisdiction as against the Secretary of the Interior.

McGarrahan's petition, on which this mandamus issued, is barren of every and all such necessary averment. It shows merely an application to the Secretary of the Interior, and discloses no proceeding before, or action or decision by, the Land Office; and then it proceeds to assert, that the facts stated in the application to the Secretary, "*were proven* to said Secretary, and the said Secretary *found*, from the proofs, the facts to be," &c. Not a word of this was shown to be true, in any manner, to the court below; and yet the court, finding as facts what the Secretary himself probably never knew or believed to be true, issued its prerogative writ to compel, not merely him, but his successor as well, to summarily convey this land of the United States to the relator.

SIXTH.

Before closing this brief, it is proper to observe that the judgment pursuant to which this writ of mandamus issued, was entered without even color of authority of law, and, upon the face of the record, is an absolute nullity.

1. It was filed in the clerk's office on the 8*th of July*,

1869. (Rec., p. 9.) This was in *vacation*, as the record shows.

2. This court, taking judicial notice of the general sessions of the court below, will know that a general term of the Supreme Court had occurred on the 1st Monday of *April*, 1869. It, therefore, appears that the judgment was filed during a *second* vacation, after the date of the submission of the cause, on February 6, 1869. (Rec., p. 19.)

3. The agreement of counsel in the record, (Rec., p. 19,) in fact, and in law, only extended to the vacation *next succeeding* the term in which the case was submitted. It did not authorize the entry of judgment in vacation, after the April term of the Supreme Court. It extended merely to the vacation *between* the January and April sessions.

The stipulation expired with the next vacation after it was signed.

4. The agreement was necessarily limited to the term of office of the defendant, Mr. Browning:

(a.) Because a judgment after that would be nugatory as against him.

(b.) Because the counsel acting and stipulating for him had no authority except from Mr. Browning, and could convey no power by agreement to the court beyond him and his term of office.

5. Lastly, it will be seen that the judgment is signed and filed in the clerk's office by only *two* of the judges, who were not, of course, a majority of the

members of the court; and it does not appear that these judges had authority to act, or purported to act, for the court. (Rec., p. 20.)

SEVENTH.

It is submitted that the judgment in this case is clearly null and void, and should be reversed.

E. R. HOAR.
Attorney General.

Supreme Court of the United States.

JACOB D. COX, Secretary of the Interior, plaintiff in error,

vs.

THE UNITED STATES, on relation of William McGarrahan, def't in error.

DEFENDANT'S BRIEF.

This writ of error ought not to be entertained for two reasons.

I.

On page 19 of the record is contained a stipulation entered into between the parties in the court below, by which the said cause was agreed to be submitted to the court, and that the court might render its judgment in vacation, and to be entered as of the term of said court then in session, and of the day of such submission.

The effect of this stipulation was to place the cause beyond the power of either party to prosecute a writ of error in accordance with the provisions of the judiciary act, as required to operate as a supersedeas, the writ of error being required to be taken within ten days from the date of the judgment. It was, therefore, without the ordinary course of law, and consequently a writ of error will not lie from such judgment.

2 Bacon's Ab., 452.
Van Dusen *vs.* Comstock, 3 Mass., 187.
Melvin *vs.* Bridge, 3 Mass., 305.
Brown *vs.* Stimson, 2 Mass., 445.

This stipulation was in the nature of an agreement of arbitration, and was an agreement to accept the opinion of the court to which it was submitted as the proper judgment in the case, and became a judgment by consent, from which no writ of error lies.

Alfred *vs.* Saco, 7 Mass., 380.
Carroll *vs.* Richardson, 9 Mass., 329.
Gray *vs.* Stone, 10 Mass., 165.
Noble *vs.* Jewett, 2 Chip., 36.
Withington *vs.* Strattan, 11 Mass., 394.

In the latter case the court say: "The principle established is, that when the parties have agreed that a certain judgment shall be rendered for either of them, according to the opinion of the judge, upon a case stated, the court of errors cannot rescind that agreement and enter a different judgment. It is the same in principle as if they had agreed that judgment should be entered according to the opinion of any other individual, or that it should depend upon any other collateral event. When the opinion is given, or the other event happens, and the judgment is entered accordingly, it is so entered by the consent or agreement of the parties, in like manner as if they had in any other manner ascertained what was right and just between them, and had afterwards come into court and consented to a judgment accordingly."

This principle has been frequently sustained by this court, (Graham *vs.* Bayne, 18 Howard, 60,) in which the court say, that the parties to a suit cannot by agreement introduce a new practice in this court, and further say: "If the parties agree to submit the trial both of fact and law to the judge, they constitute him as an arbitrator between them, but no consent can constitute this court appellate arbitrators." Also to the same effect,

Kelsey *vs.* Forsyth, 21 How., 85.
Guild *vs.* Frontin, 18 How., 135.
Campbell *vs.* Boyrean, 21 How., 224.
Snyder *vs.* Williamson, 20 How., 427, 433.

Where the court say: "Where a party is dissatisfied with the decision of his case in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be raised against them on the record for the information of the appellate tribunal, and if he omits to do so in any of the method sknown to the practice of such courts, he must be content to abide the consequences of his own neglect."

An agreement to refer a suit pending to an arbitrator, and that judgment be entered in conformity with his decision, will justify the entry of a judgment accordingly, which judgment will be binding upon the parties as a judgment by consent.

Bank of Monroe *vs.* Wilson, 11 Paige, 533.
Yates *vs.* Russell, 17 John., 465.
Forsyth *vs.* Shaw, 10 Mass., 253.
Hecker *vs.* Fowler, 2 Wallace, 133.

If there were any doubt as to the effect of the stipulation, such doubts are cleared up by an inspection of the supplementary record, which shows that on the 3d of May the said cause was dismissed through a misapprehension of the clerk of the statements of the respondent's counsel, which was corrected, and the cause reinstated upon the written statement of the counsel for respondent, Browning, filed on the 21st of May, 1869, as follows: "The case above entitled was heard by the court in Banc, at the term before the last, and was taken by the court under advisement. When the case was called at the last term, (meaning the May term,) I remarked that it ought to be 'off' of the calendar, as it had been argued and submitted to the court. If any other entry has been made, such entry is erroneous, as the case is still *pending and undetermined.*" This also disposes of the objection, that the stipulation only was intended to extend during *one* vacation.

II.

The record (p. 22) shows that on the 28th of October, the plaintiff in error filed a motion in the court below to vacate and set aside the said judgment for the identical errors and

irregularities alleged to have been committed that are now set up as the foundation of this writ of error, which motion was, *before any decision thereon* by the court to which it was addressed, *withdrawn, and the motion dismissed by the party making it.*

The withdrawal or dismissal of said motion was a waiver of all objections then made.

Forney *vs.* Washington Territory, 1 Wash. Ter. Rep., 14.

By the long prevailing practice of the courts, it is necessary that any irregularity in the proceedings of the courts should be brought to the notice of the court upon motion, and if no motion is made for that purpose, such irregularity is waived.

Moody *vs.* Vreeland, 9 Wen., 125.

Cook *vs.* Moseby, 13 Wen., 277.

When a party is in court, it is held that every failure to assert a legal right during the progress of a cause is a waiver of that right, and no writ of error will lie, unless objections are made to the proceedings, or the right asserted in the court below at the proper time.

Stump *vs.* Frisby, 7 Ind., 679.

Preston *vs.* Smedford, 21 Ind., 152.

Ingersoll *vs.* Bostwick, 22 N. Y. Rep., 425.

Commonwealth *vs.* Sowell, 9 Met., 572.

Wright *vs.* Moon, 11 Harris, 131.

The court, in the case cited in 7 Indiana, say, the reason of the rule being to direct the attention of the court particularly to the objection and the grounds of it, so that if erroneous it may re-examine it and correct it.

In this case, however, after making the motion, and directing the attention of the court to the objections, the party voluntarily abandons them. So, also, when a demurrer is interposed and overruled, a pleading thereafter is a waiver.

United States *vs.* Boyd, 5 How., 31.

The *irregularities* complained of, and now urged upon this court, are as follows:

1. That judgment was entered upon the merits in a case where the defendant had, in his return to the alternative writ, only set up a plea to the jurisdiction of the court. The alternative writ was in the nature of a rule to show cause why a peremptory writ of mandamus should not issue. Upon the coming in of the return to such rule, all the court can do is to determine whether upon the petition and return the writ shall issue. And *what is not answered in the return made must be looked upon as admitted to be true.*

12 Petersdorff Ab., 523.

Rex *vs.* Buckingham, 10 Mod., 174.

Rex *vs.* Mayor of Norwich, 2 Lord Raymond, 1244, 1267.

Rex *vs.* Shaw, 12 Mod., 325, 410.

Rex *vs.* Owen, 5 Keim, 669.

If the return be adjudged insufficient, a peremptory writ of mandamus issues.

Moses on Mandamus, 233.

If judgment be given for a party suing out a writ of mandamus upon demurrer, plea, or traverse, a peremptory writ will issue without delay.

Commonwealth *vs.* Alleghany Co., 32 Pa., 218, 221.

People *vs.* State, 2 Barbour, 397, 554.

2. That the writ improperly issued against the nominal defendant *or his successor in office.* The judgment being, by the terms of the stipulation, entered as of the 6th of February, 1864, was valid as against the defendant in said suit, and the act to be performed under said writ, being an official act, and not a personal act, such judgment was equally obligatory upon the successor in office of the defendant in the judgment, and the writ might properly issue, directed to the officer, without naming him.

See The People *vs.* Collins, (19 Wendell, 56, 68,) in which case the doctrine is clearly stated and the grounds thereof; that court saying, in conclusion, in that case: "The obligation sought to be enforced devolves upon no particular set of

commissioners, and no right is in question which will expire with the year. The duty is perpetual upon the present commissioners of Smyrna *and their successors*, and the peremptory writ may be directed to and enforced upon the commissioners of the town generally. To say otherwise would be a sacrifice of substance to mere form."

3. That the judgment was signed in vacation.

The practice of entering judgments in vacation by consent has been of long standing in the courts of this country and in England, and I will simply refer the court to the case of Hecker *vs.* Fowler, 2 Wallace, 133, which has already been referred to, it being a case where a judgment was entered upon the coming in of the report of a referee by stipulation; the agreement in that case in effect waiving the right of filing exceptions to such report before judgment.

4. That the judgment was signed by only two of the justices of the court.

The judgment, as such, was not signed by either of the justices of said court, but purports on its face to be the judgment of the court, and it is so entered by the clerk of said court; but appended to the judgment is an order signed by two of the justices, directing the clerk to enter the judgment as of the day of its submission, in conformity with the stipulation of the parties. The record on its face is correct, and this is not the manner of impeaching it.

Objection is also made that the petition in this case does not negative one of the provisos in the section of the act upon which it was based.

The section referred to contains three several provisos: One that the provisions of said section shall not apply to a certain locality; one that it shall not apply to lands containing mines of gold, silver, copper, or cinnabar; and one relating to the survey of such lands in reference to permanent improvements.

The rule of pleading was laid down by the court in the case of Jones *vs.* Axar, (1 Lord Raymond, 119,) as follows:

"When an exception is incorporated in the body of the clause he who pleads the clause ought to plead the exception; but when there is a clause for the benefit of the pleader and afterwards follows a proviso which is against him, he should plead the clause, and leave it to the adversary to show the proviso." Also to the same effect—

King *vs.* Bryan, 1 Story, 110.
Bennett *vs.* Hind, 3 Johnson, 438.
Tul *vs.* Fonda, 4 Johnson, 304.
Hart *vs.* Ellis, 8 Johnson, 41.
Railroad Co. *vs.* Robeson, 5 Iredell, 341.

Attached to the petition is the survey of said land, certified by the surveyor general of the United States for California, together with other exhibits.

It appears that one of the reasons made in the motion below by the present plaintiff in error, and successor of the original respondents, for setting aside said judgment, is, that there is a mine of cinnabar within the limits of said tract. This fact, if true, was a good ground for such a motion, so that the court below might correct its judgment in that respect; but, as such motion was abandoned, this court cannot consider it.

III.

The return of the defendant below sets up as a defence the following:

1. That the subject-matter of the petition is purely of executive cognizance, resting in the judgment and discretion of executive officers in the ordinary discharge of their official duties.

2. That the subject-matter is one in which the judgment and discretion are to be exercised.

3. That the issuance of patents is by statutes the duty of the President of the United States.

The power to issue writs of mandamus is, it is true, confined purely to executive or ministerial acts, and not to such acts

as may require in their exercise any judicial determination, or when the officer may have proper discretion in the matter of execution.

The section of the act under which this application was made was in the nature of a proposition of sale by the United States to certain parties of certain lands, at a certain price; such proposition being based upon the further moral consideration that these parties had once purchased the lands in good faith from other parties, and had occupied and improved the same. When, therefore, the party or parties to whom this proposition is made—they being the parties embraced in the act—accept the proposition, such acceptance becomes a contract, and an offer of performance thereunder on his part entitles him to a performance upon the part of the Government, and the duties of the executive officers are simply ministerial: to receive the money and issue the patents. But, before reaching this point, there are certain facts to be determined by the executive, that is, whether the party claiming to purchase under the provision of the act is *the party* to whom the proposition is made. That is a matter of judgment and discretion in the officer, and in the exercise of such judgment or discretion he cannot be controlled; but, having exercised such judgment or discretion in favor of the party, his duties then cease as to their judicial character, and become ministerial in nature.

In this case the judicial functions of the executive had been exercised, and the officer had found the facts in favor of the relator, and this proceeding was simply to compel the execution of certain ministerial acts founded upon a judgment already made.

In considering the third reason assigned in the plea of the defendant, it is proper to examine, not only the acts of Congress relative thereto, but also the general powers and duties of the heads of the respective executive departments.

The 1st section of the act of April 25, 1812, (2 Stats., 716,) provides: "That there shall be established in the Department of the Treasury an office to be denominated the General Land Office," thereby subjecting the General Land Office to the general superintendence of that Department.

Section 8 of the same act provides:

"That all patents issuing from the said office shall be issued in the name of the United States and under the seal of said office, and be signed by the President of the United States, and countersigned by the Commissioner of the said office, and shall be recorded in the said office in books to be kept for such purpose."

The act of 4th July, 1836, (5 Stats., 107,) provides, in the 4th section, for a recorder, whose duty it shall be, in pursuance of instructions from the Commissioner, to certify and affix the seal of the General Land Office to all patents for public lands; and he shall attend to the correct engrossing, and recording, and transmission of such patents. The 6th section of the same act provides for the appointment of a secretary, whose duty it is, under the direction of the President, to sign in his name all patents, &c.

The Attorney General, upon the passage of the last recited act, was called upon for an opinion as to the effect of the act, and whether it placed the Commissioner of the General Land Office in a position independent of the Secretary of the Treasury. In reply, he states his opinion to be, that the clause of the act of 1812, which makes the Land Office a branch of the Treasury Department, is not repealed by the last-mentioned act, but says: "To prevent all difficulty, however, in respect to the power of the Secretary of the Treasury to superintend the business of the General Land Office, under the direction and control of the President, I would suggest the expediency of your authorizing and directing the Secretary of the Treasury, by order in writing, to superintend and direct, in the manner heretofore accustomed and with the usual subordination to the President, the general business of the Land Office." (See 2d Public Land Laws, Instructions and Opinions, page 104.)

The President, therefore, issued the following:

"WASHINGTON, *July* 4, 1836.

"I hereby direct, that under the act to reorganize the General Land Office, approved this day, the Secretary of the Treasury shall continue to exercise the same general power

over the said office and its various concerns which has heretofore been exercised by him, and which it may be legal for him to do under said act and the opinion thereon of the Attorney General.

"Given this day. ANDREW JACKSON."

(2d Public Land, &c., 104.)

On the 3d March, 1849, was, by law, established the Department of the Interior, (9 Stats., 395,) the 3d section of which provides, "that the Secretary of the Interior shall perform all the duties in relation to the General Land Office of supervision and appeal now discharged by the Secretary of the Treasury."

The General Land Office is therefore by statute a part and parcel of the Department of the Interior, and the officers thereof are subject to the direction of the Secretary of the Interior Department, and their acts subject to his supervision. It is his duty to see that the officers in his Department perform their duties. It is the duty of those officers to issue patents to lands to persons by law entitled to such patents. To one officer is delegated the duty of engrossing, recording, certifying, and affixing the seal of the Land Office, and issuing such patents; to another officer is delegated the duty of signing the name of the President to such patents.

Aside from this, and beyond the express powers granted by statute, the several heads of the departments are invested with full powers over all matters properly within the scope of their several departments, whether expressly delegated to them or not, and by virtue of the general rights of sovereignty.

Neilson *vs.* Lagow, 12 Howard, 101, and the cases therein cited.

The heads of the several departments act under the supposed authority of the President in all cases when not expressly authorized to act by statute, and all such acts are binding, unless expressly countermanded by the President; and when certain duties thereby devolve upon the President, the heads of the departments are by law the ministerial agents in the performance of such duties.

Little *vs.* Barrence, 2 Cranch, 170.

Lockington *vs.* Smith, 1 Peters C. C. R., 466.
Parker *vs.* The United States, 1 Pet. U. S. R., 293–296.
Wilcox *vs.* McConnell, 13 Peters U. S. R., 498–512.
United States *vs.* Eliason, 16 Peters U. S. R., 291–302.
Wilkins *vs.* United States, 1 How., 290.

It therefore follows, that each and every of these subordinate officers, including the Commissioner of the General Land Office, the recorder, and the secretary—the former and latter acting nominally under the direction of the President—are under the general supervision and direction of the head of the Interior Department.

The entire duties of issuing patents are performed by certain specified officers. The President is required to perform no personal act in the matter, and it will be observed that the same language of the statute is used in reference to the Commissioner as to the secretary for signing patents, each to act under the direction of the President of the United States. The rule being held that the Commissioner is subject to the supervision of the head of the Department, the same reason will apply to the application of the rule to the subordinate and strictly ministerial officer who affixes the signature to the patent.

In this case the Secretary not only does not direct his subordinates to perform the duty of issuing the patents to which the relator is entitled by law, but absolutely refuses to permit the initiative steps to be taken towards that result.

The Attorney General, in his brief, which I find published in the newspapers, has seen fit to criticise the conduct of the court below in a manner, as it seems to me, wholly unwarranted by the record. The petition sets forth the facts entitling the relator to a patent for the land claimed, and that these facts had been proven to the satisfaction of the Secretary of the Interior; that those facts had been determined by him, but that the Secretary refused to issue the patent without any just cause. This was not denied by the Secretary, but he simply interposed a denial of the jurisdiction of the court in the matter. The parties severally had full confidence in the